79-178

In the

Supreme Court of the United States

October Term, 1979

No.

In the Matter of
HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.
WELLINGTON PRINT WORKS, INC.,

Debtors.

ROSE SHUFFMAN, As Executrix of
the Estate of OSCAR SHUFFMAN, Deceased,

Petitioner,

—against—

HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.
WELLINGTON PRINT WORKS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit, entered December 6, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. K infra) is reported at 588 F.2d. 872.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 6th, 1978. The order of the United States Court of Appeals for the Second Circuit denying rehearing of the said appeal was entered on March 5th, 1979 and appears as App. M. infra. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254.

By order dated May 11th, 1979, Mr. Justice Marshall granted petitioner's application for an extension of time within which to file this petition to and including August 2nd, 1979.

QUESTIONS PRESENTED

1. Whether, under Putman v. Day, 89 U.S. 60 (1874); Matter of Gervich (8th Cir., 1978), 570 F.2d 247; Matter of Unishops, Inc. (2nd Cir., 1977), 553 F.2d 305, a debtor-in-possession is bound by its Answer and Statement of Executory Contracts?

Inherent in the opinion of the Court of Appeals is an emphatic "NO."

2. Whether, under In re Wil-Low Cafeterias, Inc. (2nd Cir., 1940), 111 F.2d 83, a court-approved compromise of a dispute over an executory contract listed on a debtor-in-possession's Statement of Executory Contracts constitutes a "new" contract, a modification of the listed executory contract and/or a ratification of the listed executory contract?

The Court of Appeals answered this question by holding that the compromise agreement is a "new" contract.

3. Whether, under the ruling in Richmond-Carcia Oil Co. v. Coates, (5th Cir., 1927) 17 F.2d. 262, the subsequent modification or cancellation of a contract concluded between the principal and a party produced by a broker adversely affects the broker's right to his commission, where the broker neither consents thereto nor acquiesces therein?

The Court of Appeals answered this question in the affirmative.

4. Whether, under the ruling in Chicago Deposit Vault Company v. McNulta, 153 U.S. 554, (1894) a debtor-in-possession may contract for large sums of money in an agreement extending beyond the arrangement, intended to be binding upon the trust without prior court approval?

The Court of Appeals answered this question in the affirmative.

5. Whether, under Pepper v. Litton, 308 U.S. 295 (1939), where the determination of a dispute between third parties, both of whom have submitted to the Court's jurisdiction by filing proofs of claim, one of whom is a party to a court-approved compromise of a dispute regarding a related contract, may result in an added expense or claim against the debtor-in-possession for administration expenses, does the Bankruptcy Court have the jurisdiction and the duty to fully adjudicate the controversy?

The Court of Appeals answered this question in the negative.

6. Whether, under the rulings in Hurley v. Atcheson, Topeka & Santa Fe Railway Company, 213 U.S. 126, 29 S.Ct. 466, 53 L.Ed. 729 (1909) Grief Bros. Cooperage Co. v. Mullinix et al., (8th Cir., 1930), 264 F.2d 391 Matter of Unishops, Inc., (2nd Cir., 1977) 553 F.2d 305, a debtor-in-possession may accept the benefits of an executory contract without accepting the burdens as well?

The Court of Appeals answered this question in the affirmative.

7. Whether, under the rulings in Protective Committee, etc. v. Anderson, 390 U.S. 414 (1968), a debtor-in-possession, in seeking Court-approval for a Compromise agreement, may

withhold names of interested parties (i.e., brokers) from the Court and Creditors' Committee and fail to notify such interested parties?

Inherent in the Opinion of the Court of Appeals is an affirmative answer to this question.

8. Whether, under the ruling in United States v. United States Gypsum Co., et al., 333 U.S. 364; 68 S.Ct. 525, 92 L.Ed. 746 (1948), a finding of fact that a listed executory contract terminated before the filing of the Chapter XI Petition is "clearly erroneous" as a matter of law, requiring reversal?

Inherent in the Opinion of the Court of Appeals is a negative answer to this question.

9. Whether, under the ruling in Matter of Steelship Corporation, (8th Cir., 1978), 575 F.2d 128, Brown v. Presbyterian Ministers Fund, (3rd Cir , 1973), 484 F.2d 998; In re Public Ledger, Inc. (3rd Cir., 1947), 161 F.2d 762; In re Greenpoint Metallic Bed Co., Inc., (2nd Cir., 1940), 113 F.2d 881; Matter of Unishops, Inc. (2nd Cir., 1977), 553 F.2d 305; and U.S. Metal Products Co. v. United States, (E.D. - N.Y., 1969), 302 F.Supp. 1263, a broker's unlisted executory contract is ratified and assumed by a debtor-in-possession's voluntary act of payment, when any other interpretation would violate Supreme Court dicta and the acts of the parties can not be fairly interpreted any other way?

The Court of Appeals answered this question in the negative.

10. Whether, under the rulings in Reading Co. v. Borwn, 391 U.S. 471, 88 S.Ct. 1759, 30 L.Ed. 2d 751 (1968); Matter of Steelships Corporation, supra, Matter of Unishops, Inc. (2d Cir., 1977), 553 F.2d 305; and In re California Eastern Airways, (D.C.D.-Del., 1951), 95 F.Supp. 348, an expense arising from a contract commitment of a debtor-in-possession, from which the debtor-in-possession not only received benefits but according to whose terms the debtor-in-possession voluntarily conforms, is an expense of administration?

The Court of Appeals answered this question in the negative.

11. Whether, under the rulings in Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944); Shawkee Mfg. Co. v. Hartford Empire Co., 322 U.S. 271 (1944); Pepper v. Litton, 308 U.S. 295 (1939); Barr Rubber Products Co. v. Sun Rubber Co., (2nd Cir., 1970), 425 F.2d. 1114; Pepper v. Litton, supra. the Supreme Court has a duty to vacate and reverse an order based upon a "fraud on the Court" perpetrated by its officers in order to defeat the rights of an administration creditor?

Insofar as this question relates to the Court of Appeals, inherent in the Opinion of the Court of Appeals is a negative answer to this question.

12. Whether the failure to list an executory contract on the debtor-in-possession's Statement of Executory Contracts and the failure to permit an evidentiary hearing deprived the claimant of substantial due process as a matter of law?

Inherent in the Opinion of the Court of Appeals is a negative answer to this question.

STATEMENT OF FACTS

Petitioner is the executrix of the estate of Oscar Shuffman, who, prior to the filing of the Chapter XI petition, had entered into a commission agreement with Hartford Textile Corporation, the debtor-in-possession. The contract provided that Shuffman was to receive a finder's fee of one cent per pound on all vinyl delivered to Hartford under a separate contract between Hartford and Rudd Plastic Fabrics Corporation. The contract between Hartford and Rudd called for periodic shipments of an eventual total of ten million pounds of vinyl.

At about the same time, and with the full knowledge of Hartford, Shuffman entered into an agreement with Rudd providing that Shuffman was to receive a sales commission of four percent of all merchandise sold and shipped to Hartford during a five-year period.

Shortly thereafter, Rudd notified the debtors that it would not honor its agreements with the debtors unless it was excused from delivering a lighter yield of material called for in the purchase order agreements which it had accepted.

Rudd, the debtors, Shuffman and their respective counsel then met together, resulting in a reaffirmation by Rudd of its entire commitment to the Debtors and of its obligation to Shuffman.

Rudd then started shipping to the debtors under the purchase orders; but continued to withhold the lighter yield. Rudd also refused to honor its contract with Shuffman. The debtors did honor their agreement with Shuffman, paying commissions as merchandise was received and accepted from Rudd.

Before Hartford encountered the financial difficulties that forced it into Chapter XI, Rudd made partial deliveries of only the heavier yield of vinyl pursuant to the agreement, Hartford paid commissions to Shuffman based upon the amounts received, Rudd failed to pay Shuffman on the amounts shipped, and Shuffman commenced an action against Rudd in order to force compliance with his agreement with them.

During the Shuffman-Rudd litigation, Hartford agreed to a voluntary price increase in an effort to obtain the lighter yield of vinyl under its contract. However, Rudd still persisted to deliver only the heavier grade of vinyl and refused to deliver the lighter yield. Shuffman then settled his litigation against Rudd by reducing his compensation from Rudd on the first two purchase orders predicated upon Rudd's agreement to make delivery of the lighter yield, extending the Shuffman-Rudd agreement to whatever period of time was necessary in order for Rudd to make full delivery of the original ten million pounds of vinyl as called for by Hartford.

As financial problems beset Hartford, it fell behind in its payments to Rudd for goods received. Approximately two weeks before Hartford filed its Chapter XI petition, Rudd notified Hartford that, because of Hartford's delinquencies, it would cancel the supply contract. Hartford countered that it was Rudd who breached the agreement by failing to deliver the lighter yield of vinyl and was withholding payments as a result.

For the purpose of the bankruptcy proceedings, Hartford's counsel, Samuel Bushwick, Esquire, associated himself with the firm of Weil, Gotshal and Manges. Both Bush-

wick and the firm of Weil, Gotshal and Manges worked and consulted together in the filing of the Chapter XI petitions and the statement of affairs revealed that both were paid in advance of the filing.

In the original petitions of Hartford and Wellington, four lawsuits against the debtors and their officers were omitted, although Mr. Bushwick was defense counsel on each. These four lawsuits, started by the brothers and sister of the president of Hartford (Supreme Court, New York County, Index Nos. 2162/65, 3528/65, 7443/65 and 9400/65), charged the corporate officers with fraud, mismanagement, waste and conversion. Significantly, one of these actions was a stockholders' derivative action.

Subsequently, when the schedules of assets and liabilities and the statement of executory contracts were filed, no mention was made of these pending litigations and no mention was made of the agreement with Shuffman. The statement of executory contracts did, however, list the Hartford-Rudd agreement.

Immediately after filing the Chapter XI Petition, the debtor-in-possession, on advice of counsel, waived Rudd's pre-petition breach and demanded continued performance under all the terms of the pre-petition contract, under threat of suit, including delivery of all grades of vinyl.

As a direct result of this threat of suit, Hartford and Rudd entered into compromise negotiations to which Shuffman was originally invited and subsequently excluded, with a promise that his interests would be protected and given a $1,500.00 pre-payment of his fee from Hartford as a sign of good faith. The

compromise agreement eventually reached, which called for delivery of approximately 1.2 million pounds of vinyl at an increase in price and excused Rudd from delivery of the lighter yield, which was to be obtained elsewhere, was submitted to the Creditor's Committee for approval and in so doing no mention was made of the Shuffman agreement. Predicated upon the approval of the Creditor's Committee, it was approved by the court, without prior notice to Shuffman and with no mention being made of the Shuffman agreement or the pre-payment to Shuffman. Shuffman had not yet filed a claim against the debtor. However, the debtor continued its monthly payments to Shuffman.

Shuffman was then threatened with the discontinuance of his monthly commission payments unless he cooperated with the debtor's efforts to arrange with W.R. Grace a settlement along the lines of the Hartford-Rudd settlement. As a result, Shuffman decided to file a formal (pro se) claim to protect his interests.

Shuffman's pro se claim, when filed, was for approximately $80,000 for work, labor and services pursuant to contract. During the next three months, and prior to the confirmation of the plan of arrangement, Shuffman was paid, pursuant to his contract, on goods received and accepted by Hartford subsequent to the filing of its petition and delivered pursuant to the compromise agreement. Shuffman accepted these payments "as only part payment on money owed to O. Shuffman. . . . only as per original agreement of R. Magid, Pres. Hartford Textile Corp. and Oscar Shuffman." These payments were listed and reported to the Court as expenses of administration.

Approximately three months after Shuffman filed his pro se claim, the plan of arrangement was confirmed and the debtor filed an objection to Shuffman's claim stating that Hartford's books and records showed $1,232.87 owing to Shuffman and simultaneously discontinued making payments to Shuffman on advise of counsel since there was no new agreement and withdrew its objection to the W.R. Grace claim. On the date of confirmation, Shuffman was indebted to the debtor in excess of $2,000.00 for unearned commissions advanced to him and the Hartford Rudd compromise agreement had about four months to go.

Extensive negotiations were had by the debtor and Shuffman's then counsel, during which Shuffman died. When it appeared likely that a tenative agreement was in the offing the objection to Shuffman's claim was withdrawn.

Approximately eleven months later, when negotiations broke off, the debtor moved to restore the objection and Shuffman's counsel, at that time counsel for the executrix, cross-moved to amend the claim to assert an administrative expense in part, entitled to priority and/or to amend the compromise order.

In its answer to the application, the debtor-in-possession admitted that it was a party to listed executory contracts with Rudd and had listed these contracts in its statement of executory contracts. The debtor also maintained that its only indebtedness to Shuffman was $1,232.87, pre-petition.

OPINIONS OF THE BANKRUPTCY COURT

The Bankruptcy Court granted the debtors' motion to reinstate its objection, refused to allow time for discovery, and simultaneously ordered an immediate hearing limited to the pre-petition liability, while reserving decision on the Cross-Motion to amend the claim so as to treat the major portion thereof as an administrative expense entitled to priority, for payment of the administrative expense, or, in the alternative, to amend the Court-approved Hartford-Rudd compromise order to provide for the continuation of commission payments to Shuffman from both Hartford and Rudd. To the cross-motion, as exhibits, were attached copies of statements by Hartford as debtor-in-possession to Shuffman and checks paid pursuant thereto. The Court also held that indebtedness, if any, incurred during the Arrangement and thereafter was a question of law, not fact, for which no hearing was required or testimony allowed.

The bankruptcy court eventually ruled that the claim be reduced to $432.67, as a general unsecured claim, based upon the testimoney of Reuben Fox, debtors' Comptroller, that a 64(a)(2) payment had been made to Shuffman pursuant to Court Order shortly after the petitions were filed, based upon entries in the books of Oxford Chemicals, Inc., another one of the debtors. The report of the Court appointed accountants, introduced as an Exhibit, found no reference to indebtedness owed to Shuffman in Oxford's books.

The cross-motion of the Estate was denied substantially because the Court characterized the Court-ordered debtor-Rudd Compromise as a "new" agreement. The Court found that the original Hartford-Rudd and Shuffman-debtor

agreements had terminated, although the Court also held that Rudd's Notice of Cancellation for the executory contracts listed in the debtor-in-possession's Statement of Executory Contracts was sent after the filing of the Chapter XI Petitions. The original Hartford-Rudd agreements had no provision covering the eventuality of insolvency of either party.

The Bankruptcy Court further held that there could be no post-petition liability to Shuffman in the absence of a post-petition contract. The Opinion, in pertinent part, stated:

> "The simple fact is that there was no post-petition agreement between claimant and the debtor-debtor-in-possession and there cannot be a priority claim arising from a contractual position without a contract. Accordingly, there is no relevance to cases dealing with executory contracts at the time of filing in this court, and which are dealth with under Section 313(1), 11 U.S.C. §713(1)."

The Court also said:

> "Simply stated, the contract between the debtor-in-possession and Rudd after the Chapter XI was a new contract, and if it did not contemplate a need for Shuffman, it did not have to."

The Estate, claiming error, moved to amend the findings, make additional findings and to amend the Decision. Upon Reconsideration, the Bankruptcy Court found, without conducting an evidentiary hearing, that in view of the debtor-in-possession's voluntary payments which the Court overlooked in its prior Opinion there must have been a new post-petition finder's fee agreement between Shuffman and the debtors-in-possession and accordingly amended the prior Opinion and Order to call for the payment of $3,346.71 to Shuffman for the unpaid commissions on Rudd's deliveries made after Confirmation and Discharge, as administrative expenses, in addition to the total of $9,000 which had been voluntarily paid to Shuffman between the filing of the petition and the confirmation of the Plan of Arrangement and Discharge Order. The Court also amended its Opinion to find that Rudd's Notice of Cancellation was sent <u>prior</u> to the filing of the Chapter XI Petitions.

The tone of the proceedings can best be gleaned from quotations therefrom:

> "THE COURT: This is a motion to amend findings, correct?
>
> MR. SHUFFMAN: Yes, sir.
>
> THE COURT: I think in reviewing the matter it is probably so. There is one finding that doesn't change the result, I think there is something due to the claimant but not on the predicate of the dispute so much as the agreement to proceed afterwards with his services.
>
> Do you remember that to be the case, Mr. Zirinsky?

MR. ZIRINKSY: Apparently yes. We believe in dispute there were certain payments made by the debtor in possession. Apparently Mr. Maggot (phonetics) who is president of Hartford Textiles did enter into an agreement with Mr. Shuffman -- whether it was a legally enforceable contract or not, we don't believe so but nevertheless the debtor did make payment of one cent per pound on the goods to be received under the new agreement.

I am advised that there is approximately three thousand dollars owing to Mr. Shuffman based upon the total deliveries under that contract.

THE COURT: Yes. I had really not concerned myself with that. There is no doubt there was a subsequent agreement and you acted under it.

MR. ZIRINSKY: That is correct.

THE COURT: I don't think it makes a difference in the decision.

MR. ZIRINSKY: It had no relationship.

THE COURT: Just to satisfy Mr. Shuffman and give him his money how long will it take him to get that?

MR. ZIRINSKY: Assuming Mr. Shuffman agrees with our figures --

THE COURT: He won't agree with you.

MR. ZIRINSKY: Within ten days.

THE COURT: I am going to grant your application so I can make that additional finding. I don't think it bears one bit on the decision.

However, give me an appropriate order allowing the amendment and finding in that respect, all right? I am going to amend the decision. I don't think it makes a difference.

* * *

MR. ZIRINSKY: Exactly thirty-three hundred forty-six dollars and seventeen cents.

THE COURT: He will fight you on that. Send him that.

MR. SHUFFMAN: We have already gone through this and the debtor already stated there was no post-petition agreement. For them to come in now and say now there was a post-petition arrangement with Mr. Shuffman throws out everything that has gone on before and makes everything a worthless exercise.

THE COURT: I realize that.

* * *

THE COURT: I am making an additional finding of fact. Treat it as a motion for reargument. The Court adheres to its prior decision with this extra finding. You then have this right on appeal.

* * *

THE COURT: I do not wish to hear one more word from you. I reserved

the right to be arbitrary at this point although I hope I was not in a decision which at least shows it was considered.

Give me an order because you will never get it from him. You have got an appeal from the minute the order is entered. I don't want to hear another word from you."

The Amended Decision and amended findings were questioned during the hearing of a further motion for reconsideration, during which the Bankruptcy Court spoke thusly:

"Apparently you people are not giving away money. We wouldn't let you and your creditors surely wouldn't let you. You paid Mr. Shuffman periodically in the XI under, I assume, some rational nexus between you, debtor-in-possession, and this fellow and I guess in his mind he was working under an agreement. Laymen are always mystified about all this nonsense about debtor or debtor in possession. It's all garbage.

Shuffman says that he is working for these guys, they filed an XI, that doesn't change the whole world, and he continues to go and you pay him his commission, right?

Why shouldn't he get the whole thing? You people apparently relied on a status with this bird. You can't dump him like this because suddenly Weil, Gotshal says wait a minute, we have a way out, there is no contract, the fact this guy worked and we paid him that's nonsense."

Despite the apparent change in position, the Bankruptcy Judge refused to amend once again or reverse his Amended Order, leaving the question to the District Court on appeal.

OPINIONS OF THE DISTRICT COURT

The Estate appealed to the United States District Court for the Southern District of New York, which entered an Order affirming the Order and Amended Order of the Bankruptcy Court, and denying the appeal in all respects.

This Order held that:

(a) The Bankruptcy Judge was correct on the facts;

(b) The Bankruptcy Judge was correct on the law;

(c) The President of the debtor-in-possession had apparently improperly entered into a finder's fee executory contract with Shuffman for deliveries made under the Court approved Compromise with Rudd, the Pre-Petition supplier, which was allowed to be honored during the period of arrangement by the Bankruptcy Court's Amended Order;

(d) That the original agreements between Hartford and Rudd, Hartford and Grace, and Hartford and Shuffman, were not executory because they all terminated pre-filing of the petitions;

(e) That Shuffman was excluded from the negotiations leading to the Order approving the compromise between the debtor-

in-possession and Rudd, although Shuffman has been or will be paid commissions under the compromise for material received and accepted during the Chapter XI;

(f) That the dollar for dollar commission payments to Shuffman under the Bankruptcy Court's Amended Order are authorized under the holding in Denton & Co. v. Induction Htg. Corp., 178 F.2d 841 (2nd Cir., 1949), which provides for percentage payments under the Plan of Arrangement to pre-petition creditors; and

(g) Petitioner's counsel was to be severely criticized for contumely comments uttered against the Bankruptcy Judge and opposing counsel which found no support in the Record.

During the course of oral argument on the motion for rehearing, the Court was advised that a Notice of Appeal to the Court of Appeals had already been filed.

The Court was reminded that the Compromise modification ran until some four months after the Order of Confirmation and Discharge. The Court was also advised that on the date of the Order of Confirmation and Discharge, the Estate was indebted to the debtors for advances of commissions not yet earned, and that the $3,346.71 ordered payed in the Bankruptcy Court's Amended Order was for deliveries made during the four month period Post Confirmation and Discharge.

The District Court, in an exchange with counsel, stated his prior misunderstanding thusly:

> "I really don't think that I took any jurisdiction over the debtor post-confirmation, and I think it misreads the memorandum decision to suggest that.
>
> My understanding, and I think you conceded it on the record today, was that the bottom line of all these orders is that the estate will get the same treatment as any other unsecured creditor for goods actually sold prior to filing, and that the estate has been or will be paid for the goods purchased during the period that the debtor-in-possession was buying from Rudd.
>
> MR. SHUFFMAN: During and after, your Honor."

At the close of argument, the District Court Judge marked the motion fully submitted and decision reserved. Although not specifically stated, the Honorable Charles L. Brieant thought he had granted reargument, although he entered no formal Order to that effect.

Petitioner's counsel then sought advice from the District Court as to the exact status of the motion to rehear and reargue in the hopes that jurisdiction could be revested in that forum so that the District Court could properly rule on the motion to rehear and reargue although an appeal was pending.

The District Judge, apparently under the mistaken belief that the Appeal was taken after

he had determined to grant reargument, entered an Order vacating, as improvidently granted, the determination to hear reargument, and denied the Estate's motion without prejudice to such action as the parties deemed appropriate upon appeal.

The Court of Appeals, in a "CORRECTED" ORDER, denied the Motion to Remand "without prejudice to apply to Judge Brieant for whatever relief is appropriate."

The Motions made in the District Court pursuant to the "CORRECTED" Order which the District Judge called "incomprehensible" were denied for lack of jurisdiction and "want of power," because, in the words of the District Judge:

> ". . . it is not clear what relief, if any, could be regarded as appropriate, nor is it clear what was intended by that portion of the order of the Court of Appeals docketed May 9, 1978, which denied the motion to remand without prejudice to apply to [the district court] for whatever relief is appropriate."

The authenticity of the "CORRECTED" Order is now subject to question.

OPINION OF THE COURT OF APPEALS

The Court of Appeals affirmed the District Court's Order affirming the Bankruptcy Judge's Order and Amended Order in a Per Curiam Opinion dated December 6, 1978.

In affirming the lower Courts, the Court of Appeals repeated the District Court's acknowledged error, to wit, that no jurisdiction was taken for the period Post-Confirmation and Discharge, while simultaneously, albeit unknowingly, affirming such Post-Confirmation and Discharge payments.

The Court held:

> "Equally unfounded is appellant's contention that the bankruptcy judge erred in denying priority status to her claim for commissions as an administration expense. The record establishes that appellant has received payment in full on all deliveries made by Rudd to Hartford during the period of Arrangement. If appellant believes that she has not received commissions due her on deliveries made thereafter, her remedy lies not in the bankruptcy court nor on this appeal, but in a plenary action at law. See In re Gordon, 44 F.Supp. 581 (S.D.N.Y. (1942); 9 Collier on Bankruptcy 8.11, 8.12 (14th ed. 1975)."

Petitioner's counsel requested that the Court of Appeals Judicially Notice the debtor-in-possession's Statement of Executory Contracts listing the debtor-Rudd agreement. The Court of Appeals, in its Per Curiam Opinion,

however, held that:

> "Appellant contends that the compromise agreement was not a new agreement but was merely a modification of the old one. From this she argues that she is entitled to commissions on all deliveries, up to ten million pounds, made by Rudd to Hartford since the original contract was executed, including deliveries made after the petition was filed. This argument also is without merit. The Bankruptcy Court found that the original contract between Hartford and Rudd had been cancelled, and this finding has support in the record.[2] Appellant asserts that the bankruptcy court's finding of cancellation contradicted certain "stipulated and agreed facts." The "stipulation" to which appellant refers is the preliminary language in the Hartford-Rudd settlement agreement which reads "Whereas Hartford and Rudd are parties to [the prior agreement]" and which then preserves, in the event of a breach of the settlement agreement, the rights and duties of Hartford and Rudd under the prior agreement. The settlement agreement also provides that "either party shall be free to pursue any remedy at law or in equity on account of any liability or breach of duty arising prior to the effective date of this agreement."

Appellant misunderstands the purpose and legal effect of this language. It was not designed to, and did not, serve as an acknowledgment of the continued existence of the original contract, binding the bankruptcy court to find the original contract still in force. Language such as this is common to settlement agreements; it served merely to preserve for possible future lawsuits the right of Hartford and Rudd to claim a breach by the other of the admittedly terminated contract. The bankruptcy court did not, therefore, contradict any stipulated facts when it found that the original Hartford-Rudd agreement had been cancelled."

The footnote reads:

"2. The bankruptcy judge found erroneously that the agreement between Hartford and Rudd was cancelled after the filing of the Chapter XI petition. However, the parties agree that notice of cancellation was given prior to the filing. When this fact was called to the attention of the bankruptcy judge, he held that it did not change the result he had reached."

The Per Curiam Opinion also held with regard to the Pre-Petition indebtedness, that:

"Shuffman's claim, when filed, was for approximately $80,000, based on services rendered prior to the filing of the petition. However, Shuffman

conceded during the bankruptcy hearing that he had been paid commissions on all deliveries made to Hartford before the filing."[1]

The first footnote reads:

"At the time the petition was filed, Hartford owed commissions to Shuffman in the amount of $1,032.69. Six hundred dollars of that amount was paid to Shuffman pursuant to §64a(2) of the Bankruptcy Act, 11 U.S.C §104(a)(2). The remaining $432.69 became a general unsecured debt."

The Court of Appeals confusion is highlighted by the contradiction in the body of the Opinion and the Footnote. In fact, no such concession was ever made, as the Record attests, and the disputed balance of the small amount of the Pre-Petition debt was not paid.

Hartford's President's Bankruptcy Rule XI-2 Affidavit accompanying the Petition referred to Rudd's attempted repudiation thusly:

"In addition, another purported creditor of the debtor, Rudd Plastic Fabrics Corp., has threatened to commence an action in connection with Hartford's alleged breach of contract, seeking damages and the sum of $32,601.74 for goods sold and delivered. Upon information and belief, however, Hartford not only has a valid defense to said action but also has a counterclaim for breach of contract."

Despite Hartford's waiver of Rudd's default, Hartford's demand for continued performance by Rudd of all terms of the agreement, and the advice of counsel that as a matter of law the Hartford-Rudd agreement was an ongoing executory contract which was listed in the Statement of Executory Contracts, the Court of Appeals upheld the District Court holding that the listed executory agreement terminated Pre-Petition. Based upon that finding, contradicting the debtor-in-possession's Statement of Executory Contracts, and Answer, the Court of Appeals disposed of Appellant's claim thusly:

> "Appellant's contention that certain payments made to Shuffman by Hartford during the period of arrangement constituted an "affirmance" of his original commission contract also is unfounded. Shuffman's agreement with Hartford was tied to the original contract between Hartford and Rudd, and his right to commissions was contingent upon deliveries to Hartford under the terms of that contract. After the basic sales contract was terminated, "affirmance" of Shuffman's right to receive commissions thereunder would have been meaningless. Although the bankruptcy court found initially that there was no post-petition commission agreement between Hartford and Shuffman, it later made an amended finding that there was such an agreement. It based this finding on post-petition checks Hartford made out to Shuffman marked "pre-payment against new Rudd contract" and on Hartford's acquiescence in the court's proposed decision to hold it liable for commissions for deliveries under the new Rudd contract. In view of the fact that the original Hartford-Rudd contract had been cancelled, the bankruptcy court's finding that an agreement had been reached to pay commissions for deliveries made under the settlement agreement did not prejudice appellant. It entitled her instead to an additional $3,346.71 in commissions."

Despite the Bankruptcy Judge's holding that Post-Petition indebtedness was a question of law, not fact, for which Post-Petition period no hearing or testimony was allowed, resulting in the sua sponte amended findings of fact, and the District Court's reaffirmation that Shuffman was deliberately excluded from the negotiations leading to the Bankruptcy Court approved Compromise, which omitted all reference to Shuffman or his third-party rights against both the debtor and Rudd, the Court of Appeals affirmed the District Court's affirmance of the Bankruptcy Judge's Order and Amended Order entered without an evidentiary hearing with the following pronouncement:

> "With respect to the appeal on the merits from Judge Brieant's order of February 22, 1978, we conclude, despite the voluminous and vitriolic protestations of appellant's counsel, that appellant's rights in the Chapter XI proceeding were recognized and protected; and the order appealed from is affirmed."

On March 5, 1979, the Petition for Rehearing in Banc was denied by the United States Court of Appeals for the Second Circuit.

THE INCONSISTENCY OF THE OPINIONS

A comparison of the results of the Opinions of the Courts below yields the following:

The Bankruptcy Court originally found that the debtor-in-possession was indebted to Petitioner in the amount of $432.69 as a general unsecured pre-petition claim, which under the Plan, was reduced to $43.27, and that no indebtedness existed for the period post-petition since ". . . there cannot be a priority claim arising from a contractual position without a contract." The Court, faced with the debtor-in-possession's checks and statements voluntarily paid to Petitioner, knowledge of which had been withheld from the Court, sua sponte amended its findings and Order and held that a "new" post-petition brokerage agreement had been entered paralleling the Court-approved debtor-Rudd Compromise, and that $3,346.71 was still owed for deliveries made after the Order of Confirmation and Discharge as expenses of administration.

The District Court affirmed the Bankruptcy Court on the facts and the law, but stated that the President of the debtor-in-possession had acted improperly by entering into the new brokerage agreement constituting the Bankruptcy Court's amended finding, which provided the additional $3,346.71. The District Court cited a case calling for percentage payments to pre-petition creditors in approving the dollar-for-dollar post confirmation payments, which indebtedness the Court thought was incurred during the Arrangement. On reargument, the District Court was shocked to learn that it had approved payments for the Post-Confirmation period, stating that such interpretation ". . . misreads the Memorandum . . ."

The Court of Appeals' Per Curiam Opinion affirmed the District Court's Memorandum and Order affirming the Orders of the Bankruptcy Court; but also stated that the Court would not approve Post-Confirmation payments. The Per Curiam Opinion also held that Petitioner conceded during the Bankruptcy hearing that the Pre-Petition indebtedness had been paid, which if true, would have mooted the hearing which resulted in the finding of the small outstanding Pre-Petition balance, acknowledged to be owing in a footnote to the Opinion.

Accordingly, the Opinions of the three Courts are totally inconsistent.

SUMMARY OF THE ARGUMENT

In Reading Company v. Brown, 88 S.Ct. 1759 (1968), this Court indicated that certiorari will be granted where there is presented an important issue of first impression dealing with the administration of the bankruptcy laws. The case at bar, it is respectfully submitted, falls squarely within this criteria because it deals with:

(1) the effect of a debtor-in-possession's Statement of Executory Contracts and Answer in an adversary proceeding upon the debtor's subsequent positions inconsistent therewith, contrary to Putnam v. Day, 89 U.S. 60 (1874);

(2) a question of law -- yet to be settled by this Court -- as to whether a Court-approved compromise of a dispute over an executory contract listed on a debtor-in-possession's Statement of Executory Contracts constitutes a "new" contract, a modification of a listed executory contract and/or a ratification of the listed executory contract [See, In re Wil-Low Cafeterias, Inc., 111 F.2d. 83 (2nd Cir., 1940); See, also Corbin On Contracts, 1963 edition, Section 1268];

(3) another question of law -- also yet to be settled by this Court -- as to whether or not the subsequent modification or cancellation of a contract concluded between the principal and a party produced by a broker adversely affects the broker's right to his commission, where the broker neither consents thereto nor acquises therein [See, Richmond-Carcia Oil Co. v. Coates, 17 F.2d. 262 (5th Cir., 1927); See, Also, Corbin On Contracts, 1963 edition, Section 768];

(4) the question of whether a debtor-in-possession may enter into a contract under which it undertakes to pay vast sums of money over a period of time extending far beyond the period of arrangement without the prior approval of the court, contrary to Chicago Deposit Vault Company v. McNulta, 153 U.S. 554 (1894);

(5) whether the jurisdiction of the Bankruptcy Court includes the power (and/a duty) to fully adjudicate a controversy involving the debtor-in-possession and others, who have consented to the jurisdiction of the Bankruptcy Court by filing proofs of claim, where one of the litigants is a party to a court-approved compromise agreement regarding a related contract and the adjudication of the dispute may result in an increase in the debtor's expenses of administration [See, Pepper v. Litton, 308 U.S. 295 (1939)];

(6) the question as to whether a debtor-in-possession may accept the benefits of an executory contract without accepting the burdens as well where there has been no disaffirmance [See, Hurley v. Atcheson, Topeka & Santa Fe Railway Company, 213 U.S. 126 (1909)];

(7) the duty of a debtor-in-possession, in seeking creditors' and Court approval of a compromise agreement, to reveal to the Court and to the Creditors Committee (a) the effect of such compromise agreement on third-parties; and (b) the probable claims against the debtor which would result from the Court approval of such compromise agreement as a result of the existence of related executory contracts entered into by the debtor, pursuant to Protective Committee, etc. v. Anderson, 390 U.S. 414 (1968);

(8) whether a finding of fact that a listed executory contract terminated before the filing of the Chapter XI petition is "clearly erroneous" as a matter of law, pursuant to United States v. United States Gypsum Co., et al. 333 U.S. 364 (1948);

(9) whether a broker's unlisted executory contract is ratified and assumed by a debtor-in-possession's voluntary act of payment [See, Matter of Steelship Corporation, 575 F.2d 128 (8th Cir., 1978)];

(10) whether an expense arising out of a contract commitment of a debtor-in-possession, from which the debtor received value and to which it initially adhered, is an expense of administration, pursuant to Reading Co. v. Brown, 391 U.S. 471 (1968);

(11) the duty of this Court to vacate and reverse an order which was predicated upon a "fraud on the Court" perpetrated by a debtor-in-possession in order to defeat the rights of an administration creditor, pursuant to Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944); and

(12) substantive due process questions in the administration of the bankruptcy law as to whether the failure to list an executory contract on the debtor-in-possession's Statement of Executory Contracts and the failure to permit an evidentiary hearing deprived the claimant of substantial due process as a matter of law.

As a result, we respectfully submit, the case at bar justly warrants the granting of this petition, which will undoubtedly clear up ambiguities in the administration of the bankruptcy laws.

ARGUMENT

A third-party-broker's contractual rights were abrogated by a debtor-in-possession, with the aid of the Bankruptcy Court. If perpetrated intentionally, it was a gross fraud; if unintentional, it was a grave injustice. In either event, the case warrants Supreme Court review.

A. The debtor-in-possession is bound by its Statement of Executory Contracts and Answer

Petitioner urges that the debtor is bound by its Statement of Executory Contracts and Answer [Putnam v. Day, 89 U.S. 60 (1874)] and that the Court ought to take judicial notice thereof [Barr Rubber Products v. Sun Rubber, Co. 425 F.2d 1114 (2nd Cir., 1970), cert. denied 400 U.S. 878 (1970); Matter of Gervich, 570 F.2d. 247, 253 (8th Cir., 1978); 8 Collier On Bankruptcy, 14th ed., Sec. 4.06(7)].

Assuming arguendo, that the debtor was not so bound, it would be estopped -- by the record, judicially, and by inconsistent conduct [31 C.J.S. Sections 4, 117(b)] since it may not play fast-and-loose with the Courts.

B. The Court-approved compromise agreement relating to a listed executory contract constituted a modification of the listed executory contract and a ratification of the listed executory contract as so modified.

The Court-approved compromise agreement, settling the dispute over the Hartford-Rudd listed executory contract, is an accord-executory contract, modifying the first contract and then ratifying the first contract as so modified [6 Corbin On Contracts, 1963 ed., Sec. 1268].

By the terms of the compromise agreement, the first contract was not discharged until four months after the Order of Confirmation and Discharge.[1] Therefore, and because the compromise preserved all rights under the first contract, there was no accord or satisfaction [6 Corbin On Contracts, 1963 ed., Sec. 1269].

The fact that the compromise agreement was a Court-approved contract with a debtor-in-possession has absolutely no effect on this rule [8 Collier On Bankruptcy, 14 ed, Sec. 6.32(4); Accord: In re Wil-Low Cafeterias, Inc., 111 F.2d.83].

1. The Plan of Arrangement retained jurisdiction over all "pending matters".

C. The compromise agreement, to which the broker who brought about the original agreement neither consented nor acquiesced therein, in no way affects the broker's right to recovery.

Of course, the Hartford-Rudd compromise in no way curtails Shuffman's rights, as the broker responsible for the first contract, since he neither consented to nor acquiesced therein [12 C.J.S. Sec. 64; 3A Corbin On Contracts, 1963 ed., Sec. 768; Oil Trading Associates, Inc. v. Texas City Refining, Inc. 303 F.2d. 713 (2nd Cir., 1962); Frederick Zittel & Sons, v. Schwartz, 192 A.D. 353 (N.Y. App. Div., 1920); Richmond-Carcia Oil Co. v. Coates 17 F.2d. 262 (1927); In the Matter of Steelships Corporation, 575 F.2d. 128 (8th Cir., 1978)].

D. The debtor-in-possession may not accept the benefits of an executory contract without accepting the burdens as well.

Further, it is well settled that in actions under the Bankruptcy Act, the debtor or the trustee is not free to retain the favorable terms of an executory contract and reject only the unfavorable ones. [8 Collier's On Bankruptcy, 14th ed., Sec. 315 (6,7); Matter of Steelships Corporation, supra; Hurley v. Atcheson Topeka & Santa Fe Railway Company, 213 U.S. 126 (1909); Grief Bros. Cooperage Co. v. Mullinix, et al., 264 F.2d. 391 (8th Cir., 1920); Matter of Unishops, Inc. 553 F.2d. 305 (2nd Cir., 1977)].

E. The holding of a new brokerage agreement, extending beyond the administration period, and involving large outlays of cash without prior Court approval, constitutes a clear abuse of discretion and violates Supreme Court dicta.

In Chicago Deposit Vault Co. v. McNulta, 153 U.S. 554, at page 561, 14 S.Ct. 915, at page 918, 38 L.Ed. 819, the Supreme Court remarked: "It is undoubtedly true that a receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liabilities for supplies, material, or labor needed in the daily administration of railroad property committed to his care as an officer of the court; but it seems equally well settled that the courts decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays, or contracts extending beyond the receivership, and intended to be binding upon the trust." The same general rule was laid down in Northern Pac. Ry. Co. v. American Trading Co., 195 U.S. 439, 461, 25 S.Ct. 84, 49 L.Ed. 269.

F. The debtor-in-possession assumed the original Shuffman-Hartford agreement by clear implication.

After the debtor had taken the position that there was no post-petition Shuffman-Hartford agreement, and the court so ruled, there was a sua sponte reversal and the Court, with the consent of the debtor and without any evidentiary hearing, ruled that there was a post-petition Shuffman-Hartford agreement and

fixed Hartford's liability to Shuffman thereunder by agreement of Hartford's counsel over Shuffman's objection.

Such ruling, we respectfully urge, was designed to negate Shuffman's argument that the post-petition payments by Hartford to Shuffman constituted an implied assumption of the pre-petition contract.

G. A contract commitment of a debtor-in-possession is an expense of administration.

By implication, the Second Circuit held that a contract commitment of a debtor in possession is not an expense of administration. Such holding reverses the Second Circuit prior position [In the Matter of Unishops, Inc., 553 F.2d. 305 (1977)] and violates Supreme Court dicta [Reading Company v. Brown, 391 U.S. 471, 88 S.Ct. 1759 (1968)].

H. The failure of the debtor-in-possession, in seeking Court-approval for a compromise agreement, to apprise the Court of the identity of an interested party and to give notice of the application to such interested party provides the Court with continuing jurisdiction to re-open the matter upon the request of any interested party.

Pepper v. Litton, 308 U.S. 295 (1939); 8 Collier On Bankruptcy, 14th ed., Sec. 315; American United Mutual Life Insurance Co. v. City of Avon Park, Florida, 311 U.S. 138 (1940).

I. The effect of a fraud perpetrated upon the Court is continuing jurisdiction to vacate or modify any order fraudulently obtained.

Pepper v. Litton, 308 U.S. 295 (1939); 8 Collier On Bankruptcy, 14th ed., Sec. 315; American United Life Insurance Co. v. City of Avon Park, Florida, 311 U.S. 138 (1940); Hazel-Atlas Glass Co. v. Hartford Empire Co. 322 U.S. 238 (1944).

J. In equity, the Court has the obligation to fully adjudicate the controversy to prevent inconsistent Orders of other Courts

When Shuffman brought to the attention of the court (a) that he was an interested party to the Rudd-Hartford compromise agreement; (b) that as a result of the Rudd-Hartford compromise agreement Shuffman would have a claim against the debtor and Rudd, and (c) that the application to the court for approval of the compromise contained false and misleading statements, the Court, exercising its equity powers, was obligated to fully adjudicate the controversy, inclusive of the Shuffman-Rudd portion thereof, in order to prevent inconsistent judgments by other Courts [Pepper v. Litton, 308 U.S. 295 (1939); Young v. Higbee Co., 324 U.S. 204 (1945); Case, et al. v. Los Angeles Lumber Co., 308 U.S. 106 (1939); In re Sherman Plastering Corporation, 340 F.2d. 915 (2d Cir., 1968)].

Under the Rudd-Shuffman stipulation of settlement, Shuffman would be entitled to a higher rate of compensation under any "new" agreement.

K. Conclusion

Hartford has switched positions during the litigation, varying diametrically from its Answer interposed in the adversary proceeding and its Statement of Executory Contracts. The Court ruling was clearly erroneous in its holding, among others, that the Court-approved compromise agreement settling a controversy over a listed executory contract constituted a "new" agreement and, more importantly, that the "new" (compromise) agreement adversely affected Shuffman's rights as the broker. In so ruling, the Court erroneously permitted the debtor to accept the benefits of the Shuffman-Hartford contract without the burdens thereof.

The legal fiction (without benefit of any evidentiary hearing) that a new brokerage agreement existed post-petition, which agreement extended beyond the administration period and involved large outlays of money -- all without prior Court approval -- constituted an abuse of discretion, in violation of Supreme Court dicta. The facts all point to the fact that the debtor-in-possesson assumed the original brokerage agreement, which would have been an expense of administration.

Significantly, when Shuffman brought all of the facts out in the open, the Court had the direct obligation to reopen the matter and fully adjudicate all parts thereof.

IMPORTANCE OF THIS PETITION

This petition presents a situation where the Court of Appeals for the Second Circuit has determined federal questions (a) inconsistent with prior rulings of this Court; (b) in conflict with rulings of other Circuits; and (c) not previously determined by this Court:

(1) In Putnam v. Day, 89 U.S. 60 (1874), this Court determined that in equity proceedings a defendant is absolutely bound by its answer. Yet, the Second Circuit permitted Hartford to take a position inconsistent with its answer and Statement of Executory Contracts.

(2) The Second Circuit held that a court-approved compromise of a dispute over an executory contract listed on a debtor-in-possession's Statement of Executory Contracts constitutes a "new" contract. This holding, which reverses the Second Circuit's position taken In re Wil-Low Cafeterias, Inc., 111 F.2d 83 (1940) is diametrically opposed to any rational interpretation of contract law [See, Corbin On Contracts, 1963 edition, Section 1268] and fairly presents to this Court a question never previously determined which ought to be determined by the Supreme Court.

(3) The Second Circuit held that the subsequent modification or cancellation of a contract concluded between the principal and a party produced by a broker adversely affects the broker's right to his commission, where the broker neither consents thereto nor acquiesces therein. This holding is contrary to that of the Court of Appeals in Texas as reflected in Richmond-Carcia Oil Co. v. Coates, 17 F.2d 262 (5th Cir.,1927) and known contract law [See,

Corbin On Contracts, 1963 edition, Section 768]. As such, it presents to this Court a question of law never previously decided by the Supreme Court, which ought to be determined by this Court.

(4) The Second Circuit permitted a debtor-in-possession to enter into a contract under which it undertook to pay vast sums of money over a period of time extending far beyond the period of arrangement, without prior Court approval contrary to this Court's holding in Chicago Deposit Vault Company v. McNulta, 153 U.S. 554 (1894).

(5) The Second Circuit interpreted the jurisdiction of the Bankruptcy Court so as to preclude a full adjudication of a controversy involving the debtor-in-possession and two claimants who had submitted to the jurisdiction to the Court by filing proofs of claim, one of whom consented to a Court-approved compromise agreement involving a related contract and which dispute resulted in a new claim against the debtor, contrary to this Court's holding in Pepper v. Litton, 308 U.S. 295 (1939).

(6) The Second Circuit permitted the debtor-in-possession to accept the benefits of an executory contract, never disaffirmed, without accepting the burdens as well, contary to this Court's holding in Hurley v. Atcheson, Topeka & Santa Fe Railway Company 213 U.S. 126 (1909).

(7) The Second Circuit permitted a debtor-in-possession to obtain Creditors' Committee and Court approval of an agreement compromising a dispute over a listed executory contract by an application which failed to reveal the effect which the compromise agreement would have on the broker who arranged the listed executory contract and the broker's

probable claims arising therefrom, contrary to this Court's holding in Protective Committee, Etc. v. Anderson, 390 U.S. 414 (1968).

(8) The Second Circuit held that an expense arising out of a contract commitment of a debtor-in-possession, from which the debtor received value and to which it initailly adhered is not an expense of administration, contrary to this Court's ruling in Reading Co. v. Brown, 391 U.S. 471 (1968).

(9) The Second Circuit held that a finding of fact that a listed executory contract terminated before the filing of the Chapter XI petition was not "clearly erroneous" as a matter of law, contrary to this Court's holding in United States v. United States Gypsum Co., et al., 333 U.S. 364 (1948).

(10) The Second Circuit held that it did not have a duty to vacate and reverse an order based upon a "fraud on the Court" perpetrated by the debtor-in-possession in order to defeat the rights of an administration creditor, contrary to this Court's holding in Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944).

(11) The Second Circuit held that the failure of a debtor-in-possession to list an executory contract on its Statement of Executory Contracts coupled with the bankruptcy court's failure to permit an evidentiary hearing did not deprive the claimant of substantial due process as a matter of law.

As such this case presents the ideal case for review of ambiguities in the administration of the bankruptcy laws.

CONCLUSION

Petitioner respectfully prays that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

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New York, New York
July 28, 1979.

APPENDIX A

FIRST OPINION OF BANKRUPTCY COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter	:	Arrangement
-of-	:	Nos.
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC.,	:	73-B-674-676
Debtors.	:	O P I N I O N

APPEARANCES:

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BY: BRUCE R. ZIRINSKY, ESQ., of Counsel

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* * * * * * * * * * *

ROY BABITT, Bankruptcy Judge:

On July 3, 1973, Hartford Textile Coporation, Oxford Chemicals, Inc. and Wellington Print Works, Inc., New York corporations engaged in activities in the textile world, filed separate petitions in this court for the relief contemplated by Chapter XI of the Bankruptcy Act, Sections 301 et seq., 11 U.S.C. §§701 et seq. By force of Sections 342 and 343, 11 U.S.C. §§742 and 743, those debtors became debtors-in-possession, and were

authorized to operate their businesses in the congenial climate of Chapter XI. Later, in the unfolding of the Chapter XI process, and following a hearing, these separate Chapter XI cases were substantively consolidated into one case for all purposes. See inter alia, Chemical Bank New York Trust Co. v. Kheel, 369 F.2d 845 (2d Cir. 1966).

In keeping with the statutory imperatives, claims by creditors were interposed in order that they be eligible to participate in a share of the debtors' assets in accordance with a plan to be proposed by the debtor. Eventually, the debtor was able to confirm the plan accepted by its creditors. Sections 356 et seq. The claim here has not been accommodated under the terms of the debtor's now confirmed plan because the debtor, as debtor-in-possession under Section 342, 11 U.S.C. §742, possessed of "all the powers of a [bankruptcy] trustee" (brackets added), has objected to the allowance of this claim under Section 47a(8), 11 U.S.C. §75a(8). This objection has generated the claimant's cross-motion to amend the objected to claim. The stage has thus been set. The facts appear to me to be these:

Before the commencement of this Chapter XI case, Hartford Textile Corporation ("Hartford") had entered into separate agreements with Rudd Plastic Fabrics Corporation ("Rudd") and W. R. Grace & Company ("Grace") for the purchase of vinyl. The agreements with Rudd and Grace were embodied in purchase orders. In connection with these agreements, Hartford entered into two separate agreements with Oscar Shuffman, whereby Hartford bound itself to pay a finder's fee of one cent per pound on goods ordered, received and accepted by Hartford under its agreements with Rudd and Grace.

After the filing of the Chapter XI petitions, Rudd gave written notice to Hartford that it was terminating its agreement because of Hartford's default in payment. Some time later, Hartford, by then a debtor-in-possession, and Rudd entered into negotiations culminating in a new agreement for reduced quantities at altered prices. That agreement was approved by this court. Pursuant to its terms, Hartford and Rudd released each other from any future obligations under their original agreement. After the debtor's entry into this court, Grace also refused to deliver any goods to Hartford because of the latter's failure to make payments for goods previously delivered. Since the filing of the petitions, Hartford has not purchased any vinyl from Grace.

Shuffman timely filed his proof of claim for $80,000 against Hartford and asserted general, unsecured creditor status. The debtor-in-possession's objection to this claim is based upon disclosures from its books and records that the indebtedness owing the claimant was $1,232.87, later reevaluated to be $1,032.69, for commissions on goods actually received and accepted by Hartford from Rudd and Grace as of the date of the filing of the Chapter XI petitions. Payments totalling $600 were made in satisfaction of this debt during the course of the Chapter XI, pursuant to Section 64a(2) of the Act, 11 U.S.C. §104a(2).

Pending settlement negotiations, the objection to Shuffman's claim was withdrawn. These efforts failed and Shuffman then died. The debtor applied to the court for restoration of its objection to the claim some two years after the original objection was brought. By cross-motion, Shuffman's estate seeks to amend the claim to assert priority status as an expense of the Chapter XI administration

within the meaning of Section 64a(1) of the Act, 11 U.S.C. §104a(1), or, in the alternative, to amend the order of this court authorizing the post-petition contract with Rudd, so that claimant would be entitled to payment for all merchandise covered in the original purchase orders between Hartford, on the one hand, and Grace and Rudd, on the other.

I note at the outset that the alternative relief sought by claimant, i.e., to amend the order of this court just referred to, may not be had. There is no basis on the facts or the law to permit rewriting of a contract (which is really what claimant wants) to support this belated assault on the assets of this rehabilitated debtor. Simply stated, the contract between the debtor-in-possession and Rudd after the Chapter XI was a new contract, and if it did not contemplate a need for Shuffman, it did not have to. Moreover, to permit an out of time amendment to a claim where that amendment asserts what is, in essence, a new cause of action, is contrary to established law. In re G.L. Miller & Co., 45 F.2d 115 (2d Cir. 1930).

The court deals first with claimant's contention that he was denied its due process right to discovery because the court simultaneously granted debtor's motion to restore its objection to the claim and held a hearing on the objection. This contention is without merit. Bankruptcy Rule 306(c), 411 U.S. 1046, requires that an objection to a claim be in writing and that a copy of the objection and a notice of hearing be mailed or delivered to the claimant. 12 Collier on Bankruptcy, (14th ed.) ¶306.06. That Rule, operative in a liquidating bankruptcy, is made applicable to the Chapter XI case by Rule 11-33(e), 415 U.S. 1026. The requirements of the Rules were scrupulously followed by the debtor in

its request to restore its objection. Indeed, claimant's attorney agreed to the restoration, thereby obviating the need for a preliminary investigation by the court into the substantiality of the debtor's grounds for such relief. He did this by filing an affidavit in support of the debtor's motion seeking restoration of the objection to the court's calendar. No objection being taken to the reinstatement, the court could reasonably conclude that the claimant would be prepared to refute facts presented by debtor in meeting its burden of proof to reduce the claim at the date set forth for the hearing. The Supreme Court has taught that power is inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for the litigants. Landis v. North American Co., 299 U.S. 248 (1936). The court, concluding that enough time had already passed inhibiting the speedy administration of this case, exercised its discretion to proceed. The claimant had ample time to take such action as was thought needed on what was generally viewed as an issue of law.

At the hearing to restore its objection to the claim, and to consider the claimant's cross-motion to amend the claim, the debtor met its burden of overcoming the prima effect given a claim by Rule 301(b), 411 U.S. 1042, applicable in a Chapter XI by Rule 11-33(a), 415 U.S. 1024, by testimony from its Comptroller who swore that the sum due Shuffman on the date of the filing of the Chapter XI petition, in accordance with his contracts relating to purchase order agreements between Hartford and Rudd and Grace, was in the amount of $1,032.67; that $600 had been paid to the claimant during the course of the Chapter XI proceeding as commissions earned within 3

months prior to the date of the commencement of the proceeding; and that, therefore, the amount still due and owing is $432.67, the amount to which reduction was sought. Shuffman did not and does not now quarrel with the facts supported by the evidence. Clearly, he was not prejudiced by the court's determination to proceed. Indeed, that determination to proceed must be viewed in the light afforded by the fact that claimant was dead and thus could not argue the intent behind the plain words of his agreements with the debtor. Rather his quarrel with the debtor is on legal matters amply covered in his memoranda.

The defenses raised by the claimant to this reduction are two-fold: first, claimant maintains that the commission contract relating to purchase order contracts with Rudd and Grace provide for payment of a finder's fee of one cent per pound based on the quantities listed in the purchase orders, not the deliveries actually made and accepted; and secondly, claimant says that even if the commission contracts do not contemplate payment of finder's fee based on the size of the original orders, claimant is entitled to commissions for all deliveries made by Rudd under its contract with Hartford entered into, as already seen, after the Chapter XI proceedings began.

As to the first defense, the court finds that it is not substantiated by the plain language of the contract. Parties to a business contract, dealing at arm's length and with equal bargaining power, as here, will be held to a literal reading of the terms of their contract. Williams Petroleum Company v. Midland Cooperatives, Inc., 539 F.2d 694 (10th Cir. 1976). Claimant offered no evidence to dissuade the court from its presump-

tion of conscionability in the drafting of the commissions contracts in question, and so the plain meaning of the words will be construed.

There are annexed to claimant's cross-motion copies of the commissions agreements in the form of letters between Hartford and Shuffman. An excerpt from the agreement concerning commissions for Grace shipments reads as follows:

> "It is understood, however, that if for any reasons, including our own default, we do not accept goods from the supplier, you are not to have any claims against us because of such non-acceptance, your finder's fee being limited to goods actually accepted by us."

The commission agreement between Hartford and Shuffman concerning Hartford's purchase order with Rudd contained the following language:

> "It is understood that if for any reason we do not call for delivery of the full quantity ordered, or if for any reason Rudd fails to deliver any part of said orders, you are not to receive commission on the undelivered quantities and that you are to be compensated only on the delivered and accepted quantities."

I cannot conceive of clearer language; its plain meaning is clear without the necessity for judicial gloss. Simply stated, there is no ambiguity and thus nothing for this court to do to rewrite an agreement so

clearly delineating what the claimant and the debtor had in mind.

The clear, unequivocal language in the two agreements provides for Shuffman to receive commissions from Hartford only on goods actually delivered and accepted by Hartford pursuant to purchase agreements expressly described within the bodies of the two letters. Therefore, the agreements cannot possibly be construed to mean that Shuffman was to receive commissions for the full amount of potential deliveries reflected in the purchase orders. Sensing where the plain terms of his agreements put him, claimant presses his second point, i.e., that his claim should be amended to afford him status as a post-Chapter XI petition salesman so that he might be given the priority Congress gave to those unpaid during a Chapter XI case. If claimant achieves this, then his priority status as an administration creditor would have to be paid in full in keeping with the scheme of Chapter XI. His alternate plea for court sanctioned amendment of the order authorizing the debtor to deal with Rudd after the beginning of the Chapter XI is frivolous in the last degree, but will be commented on, infra.

I turn to claimant's first position. Concerning his claim for commissions on post-petition deliveries, the following facts are clear: since the filing of the Chapter XI petitions, no deliveries were made by Grace at all. No evidence indicating that the calculations in debtor's books and records concerning pre-petition deliveries were improper has been introduced. Therefore, debtor's books and records at the time of filing adequately reflect all possible commission payments due and owing Shuffman.

Similarly, the testimony of Hartford's comptroller, unimpeached upon cross-examination, that the books and records of the company reveal all monies due and owing to Shuffman as commission for goods delivered and accepted from Rudd, become part of this record, and is viewed as adequately representing amounts due Shuffman for pre-petition goods delivered by Rudd. However, the amount of compensation calculated by the debtor's comptroller for pre-petition finder's fees does not provide for payment on goods accepted and delivered in the post-petition period. Though the record reflects no post petition deliveries by Grace, post-petition deliveries by Rudd were accepted. These post-petition deliveries were made pursuant to a new purchase order agreement between Hartford and Rudd, approved by this court after the Chapter XI case began. Since the finder's fee agreement concerning quantities of accepted goods delivered by Rudd was limited, by terms of the contract, to ". . . orders #8635 and #8637", goods delivered under the new agreement cannot be construed as encompassed within the meaning of the original agreement. Therefore, deliveries under the new contract, even if the goods are identical to goods contracted for in the abrogated agreement, are beyond the four corners of the finder's fee contract.

Finally, the court recognizes that even if claimant had introduced evidence pointing to its right to commissions for all contemplated deliveries pursuant to the original purchase orders, or, in the alternative, its right to commissions for post-petition deliveries made by Rudd under its new agreement with Hartford, the motion to amend the general, unsecured claim into an administration claim would be denied by this court. Section 355(1) of the Act, 11 U.S.C. §755,

presenting time limitations for filing claims, is implemented and clarified by Bankruptcy Rule 11-33(b)(2), 415 U.S. 1025, which reads in pertinent part as follows:

> "(2) Time for Filing. A claim, including an amendment thereof, must be filed before confirmation of the plan except as follows: (A) [specific provision for filing within 30 days after notice of confirmation] (B) [claims arising from the rejection of an executory contract of the debtor]".

Plainly, the sought after amendment of claimant's in time claim would be well beyond the period fixed by the statute and implementing rule. It is no longer in doubt that the periods fixed for filing of claims in both bankruptcy and Chapter XI are statutes of limitation and there is no play for a judicial exercise of discretion.

> "The weight of authority considers the statutory six month period as mandatory and immutable. This is a statute of limitations. It is even more. It is a prohibition. It is peremptory." 3 Collier on Bankruptcy, ¶57.27 (14th ed.)

The same rule is applicable to amendments. The Advisory Committee's Note to Rule 11-33 observes that subdivision Rule 11-33(b)(2):

> "...clears up an ambiguity not answered by the statute respecting the status of amendments to proof of claim. Under this rule an amendment must be filed

> within the same time as the original proof of claim and it is not possible to obtain an extension of time based upon the amending process."

Claimant's amendment is clearly sought at a time well beyond the limitations imposed by the Act and Rules, and is not an exception within the meaning of Rules 11-33 (b)(2)(A) or (B), 415 U.S. 1024. Even if out of time amendment were to be sanctioned in an abundance of solicitude for a claimant, such tenderness cannot assist the claimant here. This is so because even a benign application of the standards for allowing relation-back of amendments within the meaning of Federal Rule of Civil Procedure 15(c) necessitates denial of claimant's proposed amendment. Federal Rule 15(c) promotes amendment of pleadings. However, it requires that the original pleading provide such notice of the original action that no possible prejudice might result. Fidelity and Deposit Company of Maryland v. Fitzgerald, 272 F.2d 121 (10th Cir. 1959) has adopted this liberal attitude to the world of bankruptcy and interpreted Federal Rule 15(c)'s guidelines in the context of amendments to claims. That court noted that:

> "The only limitation is that the amended claim should not set up a distinctly new and different claim." Id., 130.

That rule of law is in accord with In re G.L. Miller & Co., supra, and In re Gibraltar Amusements Ltd., 315 F.2d 210 (2d Cir. 1963), and the reasoning of the just cited cases is echoed by the great bankruptcy treatise which states that:

"... amendments offered after expiration of the statutory six months' period will be more closely scrutinized ... An amendment amounting to the presentment of a new claim will not be allowed after the period has expired. Thus, a creditor cannot add to his original proof, by amendment, a separate and distinct claim." 3 Collier on Bankruptcy (14th ed.) ¶57.11.

The Committee structured to promulgate the procedural Rules to govern the administration of bankruptcy and Chapter XI is in accord, as already seen. Advisory Committee Note to Rule 11-33 set out in 14 Collier on Bankruptcy (14th ed.) ¶11-33.01.

By seeking to alter the nature of its claim from that of a general, unsecured claim, on a pre-petition liability, to that of a post-petition administration claim, claimant is attempting to assert a "separate and distinct claim". This he cannot do.

The simple fact is that there was no post-petition agreement between claimant and the debtor-in-possession and there cannot be a priority claim arising from a contractual position without a contract. Accordingly, there is no relevance to cases dealing with executory contracts at the time of filing in this court, and which are dealt with under Section 313(1), 11 U.S.C. §713(1). That being so, claimant's reliance upon In re Unishops, Inc., F.2d (2d Cir. 4/19/77) is misplaced. Contrary to what is said at p.18 of his reply memorandum, that case is not "similar to the one" now treated. The Mammoth Mart, Inc., 536 F.2d 950 (1st Cir.

1976), quotation is taken out of context. The controlling fact here is that the entity arising on the Chapter XI filing was permitted to enter into a new contract with a former supplier. That entity, Shopmen's Local etc. v. Kevin Steel Products, Inc., 519 F.2d 698, 704 (2d Cir. 1975), did not see fit to continue its relationship with claimant, a relationship which fell when the original relationship between Hartford, on the one hand, and Grace and Rudd, on the other, ended. Regardless of the caution expressed in In re Unishops, Inc. 543 F.2 1017 (2d Cir. 1976), the transfiguration to debtor-in-possession is appropriate here where the court deals with a new contract entered into after the submission to this court's jurisdiction.

For all of the reasons described above, debtor's objection to the claim, seeking a reduction to $432.67, is granted, and claimant's cross-motion to amend the claim and/or the post-petition order is denied.

Submit an order.

Dated: New York, New York
June 1, 1977

/s/ ROY BABITT

APPENDIX B

FIRST ORDER OF THE BANKRUPTCY COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
		Arrangement
HARTFORD TEXTILE CORPORATION,	:	Nos.
OXFORD CHEMICALS, INC.,		73 B 674-
WELLINGTON PRINT WORKS, INC.,	:	676
Debtors.	:	

ORDER REDUCING GENERAL UNSECURED CLAIM AND DENYING MOTION TO AMEND CLAIM (OSCAR SHUFFMAN, CLAIM No.3-C).

Hartford Textile Corporation, Oxford Chemicals, Inc. and Wellington Print Works, Inc., the above-named debtors and debtors-in-possession (hereinafter the "Debtors"), having objected by application and notice of hearing dated November 1, 1974, to the allowance of the general unsecured claim filed in the consolidated Chapter XI cases by Oscar Shuffman (Claim No. 3-C) in the amount of $80,000, and the Debtors having moved the court by notice of motion dated September 23, 1976, for the reinstatement of the aforesaid objection to claim, and Rose Shuffman, as Executrix of the Estate of Oscar Shuffman, deceased having consented to the reinstatement of the Debtors' objection, and having cross-moved the court for an order amending the claim and other relief, and hearings having been held before the court on November 11, and December 20, 1976, and upon the testimony of Reuben Fox, an officer of the Debtors, and upon all of the proceedings had before the court, and the court having filed its written opinion on

June 1, 1977, fully setting forth therein its findings of fact and conclusions of law, and sufficient cause appearing therefor, it is

ORDERED that the claim of Oscar Shuffman (Claim No. 3-C) filed in the consolidation Chapter XI cases in the amount of $80,000, be, and the same hereby is, reduced to and allowed as a general unsecured claim against the Debtors' Chapter XI estate in the amount of $432.67; and it is further

ORDERED that the cross-motion of Rose Shuffman, as Executrix of the Estate of Oscar Shuffman, Deceased, to amend the claim of Oscar Shuffman and other relief, be, and the same hereby is denied in all respects and with prejudice; and it is further

ORDERED that the Schedules of Distribution annexed to the court's order, dated September 5, 1974, confirming the Chapter XI cases, be, and they hereby are, amended so as to conform to the provisions of this order; and it is further

ORDERED that John J. Barry, as Disbursing Agent, be, and he hereby is, authorized and directed to make payment in the amount of $43.27 to Rose Shuffman, as Executrix for the Estate of Oscar Shuffman, Deceased, c/o David Shuffman, Esq., 501 Fifth Avenue, New York, New York 10017, by check drawn, signed and countersigned in the manner set forth in the court's order of confirmation dated September 5, 1974; and it is further

ORDERED that John J. Barry, as Disbursing Agent, be, and he hereby is, authorized and directed to make payment to the Debtors in the amount of $7,956.73, constituting a refund of the excess of the amount reserved in connection with the claim hereinabove

reduced, c/o Weil, Gotshal & Manges, attorneys for the Debtors, 767 Fifth Avenue, New York, New York 10022, Att: Bruce R. Zirinsky, by check drawn, signed and countersigned in the manner set forth in the court's order of confirmation dated September 5, 1974.

Dated: New York, New York
July 20, 1977

/s/ Roy Babitt

APPENDIX C

SECOND OPINION OF THE BANKRUPTCY COURT

Arrangement Numbers: 73-B 674-676

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In the Matter :

-of- :

HARTFORD TEXTILE CORPORATION, :
OXFORD CHEMICALS, INC., :
WELLINGTON PRINT WORKS, INC., :

Debtors. :

----------x

6/28/77; Motion Granted as described on the record. No change is required in the court's decision.

/s/ Roy Babitt
Bankruptcy Judge

Filed June 28, 1977

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES, ESQS.
Attorneys for the Debtor
767 Fifth Avenue
New York, New York

BY: BRUCE ZIRINSKY, ESQ., Of Counsel

DAVID K. SHUFFMAN, ESQ.
Attorney for a Creditor
501 Fifth Avenue
New York, New York 10017

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P R O C E E D I N G S

THE COURT: This is a motion to amend findings, correct?

MR. SHUFFMAN: Yes, sir.

THE COURT: I think in reviewing the matter it is probably so. There is one finding that doesn't change the result, I think there is something due to the claimant but not on the predicate of the dispute so much as the agreement to proceed afterwards with his services.

Do you remember that to be the case, Mr. Zirinsky?

MR. ZIRINSKY: Apparently yes. We believe in dispute there were certain payments made by the debtor in possession. Apparently Mr. Maggot (Phonetics) who is president of

Hartford Textiles did enter into an arrangement with Mr. Shuffman -- whether it was a legally enforceable contract or not, we don't believe so but nevertheless the debtor did make payment of one cent per pound on the goods to be received under the new agreement.

I am advised that there is approximately three thousand dollars owing to Mr. Shuffman based upon the total deliveries under that contract.

THE COURT: Yes. I had really not concerned myself with that. There is no doubt there was a subsequent agreement and you acted under it.

MR. ZIRINSKY: That is correct.

THE COURT: I don't think it makes a difference in the decision.

MR. ZIRINSKY: It had no relationship.

THE COURT: Just to satisfy Mr. Shuffman and give him his money how long will it take him to get that?

MR. ZIRINSKY: Assuming Mr. Shuffman agrees with our figures --

THE COURT: He won't agree with you.

MR. ZIRINSKY: Within ten days.

THE COURT: I am going to grant your application so I can make that additional finding. I don't think it bears one bit on the decision.

However, give me an appropriate order allowing the amendment and finding in that

respect, all right? I am going to amend the decision. I don't think it makes a difference.

MR. SHUFFMAN: May I make a statement for the record?

THE COURT: Yes.

MR. SHUFFMAN: There are a minimum of two dozen errors of fact within the decision.

THE COURT: Take your appeal. I don't know whether you realize what an ultimate fact is. There couldn't be two dozen.

MR. SHUFFMAN: There are a number of erroneous decisions that go - -

THE COURT: Take your appeal right now. I am amending to add the one finding which I don't think changes the result one wit but at least you could get some money.

MR. SHUFFMAN: If you would allow me to go through - -

THE COURT: Yes?

MR. ZIRINSKY: Exactly thirty-three hundred forty-six dollars and seventeen cents.

THE COURT: He will fight you on that. Send him that.

MR. SHUFFMAN: We have already gone through this and the debtor already stated there was no post-petition agreement. For them to come in now and say now there was a post-petition arrangement with Mr. Shuffman throws out everything that has gone on before and makes everything a worthless exercise.

THE COURT: I realize that.

MR. SHUFFMAN: That has happened on more than one occasion where debtors' counsel has misrepresented the Court's files in order to influence the decision - -

THE COURT: Influence? Why don't you go then to the chief judge and complain they are peddling influence as I heard you are doing? Why don't you appeal?

MR. SHUFFMAN: I intend to appeal.

THE COURT: I have amended. It doesn't change the decision a bit in my view.

MR. SHUFFMAN: Judge, if you would allow me to go through those portions of the decision that we feel are in error, you may realize where relief is wanting.

THE COURT: Yes. I have very few feelings about lawyers who when they lose claim corruption instead of taking an appeal, and in the bankruptcy area which is schizophrenic at best it's doubly so.

Now, let me hear you.

MR. SHUFFMAN: Thank you. On page three of the decision the statement starts the top of paragraph one:

> "After the filing of the Chapter XI petitions Rudd gave written notice to Hartford it was terminating the agreement because of Hartford's default in payment."

That's incorrect.

THE COURT: What is the correct statement?

MR. SHUFFMAN: The correct statement is Rudd gave written notice prior to the filing of the Chapter XI proceeding.

THE COURT: Does that change the result?

MR. SHUFFMAN: It should.

THE COURT: I overrule you, I disagree.

MR. SHUFFMAN: The second error is:

"Sometime later Hartford by then a debtor in possession and Rudd entered into negotiations culminating in a new agreement for reduced quantities and altered prices."

That agreement was not a new agreement but a substituted agreement from the original.

THE COURT: A substitute is not new? You object to my using the word "new"?

MR. SHUFFMAN: Yes.

THE COURT: Fine. The word "substitute" will be considered as having been used.

MR. SHUFFMAN: Now, that new agreement -- in the negotiations monies were paid by the debtor in possession of this court to Rudd to cover not only -- well, to cover Rudd's commission contracts with Shuffman.

THE COURT: I don't know if that's the case, do we?

MR. ZIRINSKY: I don't know.

THE COURT: That's part of the issues. What else do you say is an error besides the use of the wrong adjective?

MR. SHUFFMAN: There is another statement in there that that agreement was approved by the Court. If in fact it was a new agreement by the debtor in possession --

THE COURT: What else do you have?

MR. SHUFFMAN: May I finish?

THE COURT: No. Anyone who comes in here and complains about adjectives and the use of the word "new" for "substitute" -- take your appeal. Give me an order amending the findings which I don't think alters the result. You give me the order.

MR. SHUFFMAN: It's not an amendment or an amended finding of fact --

THE COURT: I am making an additional finding of fact. Treat it as a motion for reargument. The Court adheres to its prior decision with this extra finding. You then have this right to appeal.

MR. SHUFFMAN: The claimant has already requested this matter be referred to the United States Attorney.

THE COURT: You refer it. You were going to refer me to the chief judge because they bribed me to rule against you.

MR. SHUFFMAN: I never said that.

THE COURT: If you want to go to the United States Attorney, go right up now and ask for Mr. Fiske and tell him Roy Babitt

suggested he see you instantly. If he is too busy don't be surprised. You can go to the chief judge of the circuit, Chief Justice of the United States.

You are a whiner. People who go into this court and claim that people were corrupted by Weil, Gotshal & Manges because they ruled against you --

MR. SHUFFMAN: No, sir.

THE COURT: I do not wish to hear one more word from you. I reserved the right to be arbitrary at this point although I hope I was not in a decision which at least shows it was considered.

Give me an order because you will never get it from him. You have got an appeal from the minute the order is entered. I don't want to hear another word from you.

You will bill Mr. Shuffman for the minutes, Mr. Rayvid, in accordance with the rules of the court.

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APPENDIX D

SECOND ORDER OF THE BANKRUPTCY COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Arrangement Nos.
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC.,	:	73 B 674-676
Debtors.	:	

AMENDED ORDER REDUCING GENERAL UNSECURED CLAIM AND DENYING MOTION TO AMEND CLAIM (OSCAR SHUFFMAN, CLAIM NO. 3-C)

Hartford Textile Corporation, Oxford Chemicals, Inc. and Wellington Print Works, Inc., the above-named debtors and debtors-in-possession (hereinafter the "Debtors"), having objected by application and notice of hearing dated November 1, 1974, to the allowance of the general unsecured claim filed in the consolidated Chapter XI cases by Oscar Shuffman (Claim No. 3-C) in the amount of $80,000, and the Debtors having moved the court by notice of motion dated September 23, 1976, for the reinstatement of the aforesaid objection to claim, and Rose Shuffman, as Executrix of the Estate of Oscar Shuffman, deceased (the "Executrix") having consented to the reinstatement of the Debtors' objection, and having cross-moved the court for an order amending the claim and other relief, and hearings having been held before the court on November 11 and December 20, 1976, and upon the testimony of Reuben Fox, an officer of the Debtors, and the court having filed its written opinion on June 1, 1977, fully setting forth therein its findings of

fact and conclusions of law and the Executrix having thereafter moved the court by notice of motion dated June 10, 1977, for an order amending the court's findings of fact, making additional findings of fact and amending its opinion of June 1, 1977, and a hearing on said motion to amend having been held before the court on June 28, 1977, and the court having signed an order on July 20, 1977, reducing the general unsecured claim of Oscar Shuffman (Claim No. 3-C) to the amount of $432.67 and denying the cross-motion of the Executrix and upon all of the proceedings had before this court and sufficient cause appearing therefor, it is

ORDERED that the court's opinion of June 1, 1977 and its order of July 20, 1977, be, and the same hereby are, amended in conformity with the provisions of this order; and it is further

ORDERED that the finding of fact contained at page 14 of the court's opinion that there was no post-petition agreement between Oscar Shuffman and Hartford Textile Corporation, as debtor-in-possession, be, and it hereby is, modified so as to find that there was a new agreement that the debtor-in-possession would pay to Oscar Shuffman commissions on goods received by it from Rudd Plastic Fabric Corp. ("Rudd") pursuant to a new agreement between Rudd and the debtor-in-possession approved by order of the court dated November 12, 1973; and it is further

ORDERED that the motion of the Executrix dated June 10, 1977, for an order amending the court's findings of fact, making additional findings of fact and amending the court's opinion of June 1, 1977, be, and it hereby is, denied in all other respects; and it is

further

ORDERED that the claim of Oscar Shuffman (Claim No. 3-C) filed in the consolidated Chapter XI cases in the amount of $80,000, be and the same hereby is, reduced to and allowed as a general unsecured claim against the Debtors' Chapter XI estate in the amount of $432.67; and it is further

ORDERED that the cross-motion of the Executrix to amend the claim of Oscar Shuffman and other relief, be, and the same hereby is, denied in all respects and with prejudice; and it is further

ORDERED that the Schedules of Distribution annexed to the court's order, dated September 5, 1974, confirming the Chapter XI cases, be, and they hereby are, amended so as to conform to the provisions of this order; and it is further

ORDERED that John J. Barry, as Disbursing Agent, be, and he hereby is, authorized and directed to make payment in the amount of $[illegible]3.27 to Ruse Shuffman, as Executrix for the Estate of Oscar Shuffman, Deceased, c/o David Shuffman, Esq., 501 Fifth Avenue, New York, New York 10017, by check drawn, signed and countersigned in the manner set forth in the court's order of confirmation dated September 5, 1974; and it is further

ORDERED that John J. Barry, as Disbursing Agent, be, and he hereby is, authorized and directed to make payment to the Debtors in the amount of $7,956.73, constituting a refund of the excess of the amount reserved in connection with the claim hereinabove reduced, c/o Weil, Gotshal & Manges, attorneys for the Debtors, 767 Fifth Avenue, New

York, New York 10022, Att: Bruce R. Zirinsky, by check drawn, signed and countersigned in the manner set forth in the court's order of confirmation dated September 5, 1974; and it is further

ORDERED, upon consent of the Debtors, that within three (3) business days of the Debtors' receipt of the refund hereinabove provided, the Debtors shall make payment in the amount of $3,346.71 to Rose Shuffman, as Executrix for the Estate of Oscar Shuffman, Deceased, c/o David Shuffman, Esq., 501 Fifth Avenue, New York, New York 10017, such payment representing the balance of commissions stated by the Debtors to be owing to Oscar Shuffman on goods received by Hartford Textile Corporation, as debtor-in-possession, from Rudd pursuant to the new agreement approved by order of the court dated November 12, 1973.

Dated: New York, New York
August 26, 1977

/s/ ROY BABITT
Bankruptcy Judge

APPENDIX E

THIRD ORDER OF THE BANKRUPTCY COURT

Arrangement Nos. 73 B 674-676

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter

-of-

HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC.,

Debtors.

NOTICE OF MOTION FOR REHEARING
AND RECONSIDERATION AND
SUPPORTING AFFIDAVIT

DAVID SHUFFMAN
Attorney for Claimant
Office & Post Office
501 Fifth Avenue
New York, New York 10017
(212) MO 1-0346

TO: WEIL, GOTSHAL & MANGES
Attorney(s) for Debtors

9/28/77: Motions denied following argument. It is so ordered.

/s/ ROY BABITT
Bankruptcy Judge

APPENDIX F

FIRST MEMORANDUM AND ORDER OF THE

DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter	:	
		73-B
-of-	:	684-676
HARTFORD TEXTILE CORPORATION,	:	MEMORANDUM
OXFORD CHEMICALS, INC., and		AND
WELLINGTON PRINT WORKS, INC.,	:	ORDER
Debtors.	:	

Brieant, J.

The Amended Order of Hon. Roy Babitt, Bankruptcy Judge, in this consolidated proceeding under Chapter XI of the Bankruptcy Act, dated August 26, 1977 is affirmed, substantially for the reasons set forth in the Findings and Conclusions of June 1, 1977, as amended on June 28, 1977, and found in the transcript of the proceedings before the Bankruptcy Judge.

The findings sought to be reviewed are not clearly erroneous. Bkcy. Rule 810. The Bankruptcy Judge has made it clear on the record that his findings and decision do not preclude claims of the personal representative of the late Oscar Shuffman against Rudd Plastic Fabrics Corp., however denominated.

Apparently one Magid, President of Hartford Textile Corporation while a Debtor-in-Possession, entered into an executory contract, improperly, and made partial payment thereunder, all without court approval. The Bankruptcy Judge's amended findings allowed that contract to be effective during the period of

the Chapter XI proceedings. Appellant is not aggrieved by that finding.

The prior agreements were not executory at the time the petitions were filed. Mr. Shuffman had done all he had to do to be entitled to payment on goods when delivered and accepted under the original agreements. These agreements were repudiated by Rudd and Grace even prior to filing.

Under a subsequent settlement with Rudd only, Mr. Shuffman was excluded from negotiations, although, as noted, he has been or will be paid a commission by the Debtor. See Denton & Co. v. Induction Htg. Corp., 178 F.2d 849 (2d Cir. 1949)

The charges of impropriety made against the Bankruptcy Judge and the attorneys for the Debtor find no support in the record. These persons are not deserving of such contumely at the instance of a member of the bar of this Court.

So Ordered.

Date: New York, New York
February 22, 1978

/s/ Charles L. Brieant
Charles L. Brieant
U.S.D.J.

APPENDIX G

SECOND MEMORANDUM AND ORDER OF THE

DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	73 B 674-676
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., and WELLINGTON PRINT WORKS, INC.,	:	MEMORANDUM AND ORDER
Debtors.	:	

Brieant, J.

Based upon two letters to the Court filed herein, dated respectively April 10, 1978 and April 13, 1978, the transcript of proceedings of March 28, 1978 and all prior papers and proceedings herein, it appears that the Court's decision to hear reargument of its Memorandum Decision and Order dated February 22, 1978 was improvident. Such reargument was heard on March 28, 1978 and decision reserved. Since that time the movant has appealed to the Court of Appeals for the Second Circuit.

The Court vacates, as improvidently granted, its determination to hear reargument, and denies the motion without prejudice to such proceedings on appeal as the parties may deem appropriate.

So Ordered.

Dated: New York, New York
April 17, 1978

/s/ Charles L. Brieant
Charles L. Brieant
U.S.D.J.

APPENDIX H

THIRD MEMORANDUM AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In re :

HARTFORD TEXTILE CORPORATION :
OXFORD CHEMICALS, INC., 73 B 674-676
WELLINGTON PRINT WORKS, INC., :

MEMORANDUM
Debtors. : AND ORDER

----------x

Brieant, J.

This Court entered a Memorandum decision and Order dated February 22, 1978 in effect affirming an order of Bankruptcy Judge Babitt, from which the Executrix of the Estate of Oscar Shuffman ("Shuffman") had appealed to the district court.

Thereafter, appellant moved for reargument in the district court. Such reargument was heard on March 28, 1978, and decision was reserved. Thereafter, Shuffman appealed to the Court of Appeals for the Second Circuit. On learning of the pendency of the appeal, this Court, by Memorandum and Order dated April 17, 1978, vacated, as improvidently granted, its determination to hear reargument, and denied the motion without prejudice to such proceedings on appeal as the parties might deem appropriate.

Then, by motion dated April 26, 1978, Shuffman moved in the Court of Appeals for an order to remand the matter to the district court. That motion was denied, by an Order

docketed May 9, 1978, "without prejudice to apply to Judge Brieant for whatever relief is appropriate." The panel of the Court of Appeals further ordered that "the oral application to stay proceedings in this Court and to extend the time to appeal from an order of Judge Brieant be and they hereby are denied."

Then Shuffman made another motion in the district court "to have a rehearing and re-argument pursuant to the order of the Court of Appeals dated May 9, 1978." That motion, docketed May 19, 1978, came on for hearing before me on June 8, 1978

All proceedings which took place in the district court were based upon the record of proceedings before Bankruptcy Judge Babitt, and such concessions and representations of uncontested fact made to this Court on the record by the counsel for the respective parties. No evidence was taken by this Court, and no findings of fact or determinations of credibility of witnesses occurred in this district court.

It now appears, the Court of Appeals having specifically denied appellant's oral application to stay proceedings in that Court, that a plenary appeal from the order of the district court of February 22, 1978 will soon be heard by a panel of the Court of Appeals. Indeed, a briefing schedule has already been adopted in that Court.

Under the circumstances, it is not clear what relief, if any, could be regarded as "appropriate," nor is it clear what was intended by that portion of the order of the Court of Appeals docketed May 9, 1978, which denied the motion to remand "without prejudice to apply to [the district court] for whatever relief is appropriate."

Cases cited by appellant as authority for further proceedings at this time in this Court do not stand for the propositions urged. Specifically, appellant relies upon Weiss v. Hunna, 312 F.2d 711 (2d Cir.), cert. denied 374 U.S. 853 (1963). We read that case to hold that once a litigant has filed a notice of appeal the district court is divested of jurisdiction to grant or deny relief under either Rule 59 or Rule 60(b), F.R. Civ.P., except with the express permission of the Court of Appeals. The order docketed in the Court of Appeals dated May 9, 1978 does not seem to grant such express authority to the district court.

There also seems to be no useful purpose which would be served by taking any further steps in the district court at this time. The Court of Appeals has before it all of the proceedings which took place before Bankruptcy Judge Babitt. Counsel for the debtor has asked this Court: "in the interests of justice and in the interests of judicial economy and in the interests of the parties, this matter is now in the Court of Appeals and let the Court of Appeals proceed with the disposition of the appeal." This requested procedure does appear appropriate.

The Clerk of the District Court is hereby directed to forward to the Court of Appeals to be associated with the matters docketed under the pending appeal the transcript of the proceedings before the district court on March 28, 1978 and on June 8, 1978.

In all other respects the relief requested by Shuffman's motion, docketed in this Court on May 19, 1978, is denied in the exercise of discretion as being unnecessary in view of the imminent hearing on the appeal to the Court

of Appeals, and is also denied for want of power. See, Weiss v. Hunna, supra.

So Ordered.

Dated: New York, New York
June 9, 1978

/s/ CHARLES L. BRIEANT
Charles L. Brieant
U.S.D.J.

APPENDIX I

FOURTH OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of :

HARTFORD TEXTILE CORPORATION, :
OXFORD CHEMICALS, INC., :
WELLINGTON PRINT WORKS, INC., :

73 B 677

Debtors. :

ROSE SHUFFMAN, AS EXECUTRIX OF :
THE ESTATE OF OSCAR SHUFFMAN, :

Claimant :

-against- :

HARTFORD TEXTILE CORPORATION, :
OXFORD CHEMICALS, INC., :
WELLINGTON PRINT WORKS, INC., :

Debtors. :

BEFORE:

HON. CHARLES L. BRIEANT,

District Judge

July 13, 1978

9:30 a.m.

APPEARANCES:

DAVID K. SHUFFMAN, ESQ.,
Attorney for Claimant

WEIL, GOTSHAL & MANGES, ESQS.,
Attorneys for Debtors
BY: LAURENCE MITTMAN, ESQ.,
BRAD SCHELER, ESQ.,
Of Counsel.

- - -

(Case called.)

THE COURT: What is it today?

MR. SHUFFMAN: Your Honor, we are here on our third motion for hearing and rearguing this Court's affirmance of the orders of Bankruptcy Court Judge Babitt and to attempt to point out to this Court the errors in its earlier orders which would necessitate an order which we have prayed be entered indicating this Court's intention to grant the rehearing and reargument which it had determined to grant on March 28th.

In this Court's order dated June 9, 1978, docketed on June 12, 1978, this Court specifically said that knowledge of the pending appeal came to this Court after it had determined to grant reargument.

We have pointed out in our moving papers that on March 28, 1978 the Court was made aware that a notice of appeal had been filed, and right after the Court was informed that the notice of appeal had been filed it stated, "I will take another look."

At the hearing of argument on June 8, 1978, on the second motion to rehear and reargue, this Court was specifically told that there was a hiatus and confusion between my office and the Court, that the notice of appeal had indeed been filed prior to the first hearing on the reargument motion.

We believe that we have cited cases now from other circuits. We have not given this Court a Second Circuit case which outlines orderly procedure if a district court judge determines to grant reargument once a notice of appeal has been filed.

This procedure had been followed in this circuit up until May 9, 1978, when the Court of Appeals entered a corrected order recognizing this Court's April 17th order as validly entered, based upon the merits.

This Court indicated on June 8th that it never reached the merits of the reargument motion and that its order vacating the determination to grant reargument was entered solely and specifically because of the pending appeal.

THE COURT: You see, I am puzzled, however, Mr. Shuffman, as to why you shouldn't just get on with your appeal. You have an appeal. You never had any matter in this court where there was any proof taken by me or any findings of credibility made or anything like that. I only sat in review of the Referee's determination here. And it seems to me that there is a jurisdictional problem here which would best be satisfied if you just went on with your appeal.

The Second Circuit can do justice in this case. In fact, I had understood that the appeal was already scheduled up there.

MR. SHUFFMAN: Your Honor, that understanding was basically incorrect. It was tentatively scheduled but --

THE COURT: Nothing prevented you from making that tentative schedule a firm one, did it?

MR. SHUFFMAN: Your Honor, the only thing that prevented it was the motion that was pending in this court which was heard on June 8th, and motion to rehear and reargue the Court of Appeals corrected order of May 9th, based upon the fact that that corrected order denied our motion without prejudice to apply to you for whatever relief is appropriate.

I believe that the Court of Appeals would have granted that motion and mandated jurisdiction back to the district court except for the representation to the Court of Appeals by my adversary that this April 17th order was entered on the merits.

Your Honor, there are now three appeals from this Court's orders pending in the Court of Appeals. There is a petition for a writ of certiorari from the May 9th, 1978 corrected order of the Court of Appeals. That particular writ seeks an immediate review by the Supreme Court of the Court of Appeals order denying the motion without prejudice in view of your original determination to grant reargument.

Now the Court of Appeals is now aware that you had determined to grant reargument based upon some of the statements made by the court that it did not intend to take jurisdiction in the period post confirmation of the plan of arrangement, and that is exactly what Bankruptcy Judge Babitt's amended order did. That was one error we pointed out which your Honor apparently acknowledged by stating that you were unaware that you took jurisdiction for a period post confirmation.

There is ample authority, as I attempted to point out the last time we argued in this court, that this court can and does have jurisdiction for the period post confirmation.

However, ordering payments, dollar for dollar payments for the period post confirmation, this court cited as authority a case calling for percentage payments to pre-petition creditors.

We also pointed out to this court that no hearing was ever held on the post petition indebtedness. Bankruptcy Judge Babitt held that to be a question of law, not of fact.

He then went on to make findings of fact in his original opinion which was pointed out to Bankruptcy Judge Babitt on a motion to rehear and argue. Bankruptcy Judge Babitt then stated that he had made mistakes and that he was amending his findings of fact and he made amended findings of fact still without a hearing regarding post petition indebtedness.

When we went back to Bankruptcy Judge Babitt a third time he was told by my adversary that those findings, amended findings, were "gratuitous". We have yet to find out what a gratuitous finding of fact made without a hearing by a United States Judge is.

THE COURT: Well, he is not a United States Judge, number one. He is a Bankruptcy Referee and the title of Referee has been changed to Judge because everybody is a judge today.

MR. SHUFFMAN: Your Honor, I think that was also --

THE COURT: Be that as it may, a gratuitous finding is a finding which is irrele-

vant and unnecessary to the ultimate conclusion.

MR. SHUFFMAN: However, it was not irrelevant and unnecessary. It centered on his entire decision. What was pointed out to be a gratuitous finding was the fact that Shuffman had no contract with the debtor in possession once the petitions were filed because of the fact that the contractee had terminated pre-petition.

Yet four months after the petitions were filed the debtor in possession and the third party, Rudd Plastic Fabrics Corp., stipulated and agreed that they were parties to those agreements which Bankruptcy Judge Babitt had found had terminated pre-petition, on which he based his gratuitous finding that Shuffman therefore had no contract post-petition.

However, if those agreements, as we have pointed out to this Court, were in existence four months after the petitions were filed, his finding of fact was in error, and his entire decision was in error. Not only have we not had a hearing for him to make this finding of fact, we did not have a hearing for him to make his amended gratuitous finding of fact.

So here we have sets of facts going up to the United States Court of Appeals for the Second Circuit. We have a petition for a writ of certiorari in the Supreme Court of the United States, based upon the Court of Appeals decision denying my motion without prejudice, our motion for mandating jurisdiction back to this court, which can all be cleared up, based upon an order entered by this Court pursuant to the cases that I have cited in the instant motion, outlining the necessary procedure once

a district court judge has determined to grant reargument. Those three --

THE COURT: It is clear that you presently have an appeal pending in the Second Circuit.

MR. SHUFFMAN: We have three appeals pending in the Second Circuit.

THE COURT: One is enough, isn't it?

MR. SHUFFMAN: No, sir, we don't believe so.

THE COURT: If you have one pending in the Second Circuit, this court would lack jurisdiction of those isues which are tendered to the Court of Appeals under the pending appeal up there.

MR. SHUFFMAN: Yes, sir.

THE COURT: I might have ancillary jurisdiction to do something of an unrelated nature in the matter. A typical case -- well, it is hard to think of a typical case but let's suppose that somebody is on bail pending appeal from a criminal conviction and he comes into the district court and he wants leave to go to Bermuda for a vacation, and this does occur; and when we make such an order enlarging his bail, we regard that as a relatively ancillary determination.

We have a hearing and determination that he will comply, if he is allowed to do so, or we might raise the bail, on the condition that he raise the money.

Those determinations are ordinarily ancillary, and they don't affect the subject matter which the Court of Appeals has.

But here what you are seeking to do is to effect the subject matter of the orders or judgments that are subject to review and are presently pending in the Court of Appeals, and it is particularly unusual in that the Court of Appeals is perfectly capable of resolving what you are suggesting is purely an issue of law.

MR. SHUFFMAN: No, your Honor, it is not an issue of law. There are issues of fact here. We have not had a hearing.

THE COURT: What is the issue of fact?

MR. SHUFFMAN: We are looking to find out -- we don't believe, number one, that the debtor has maintained or sufficed in their burden of proof regarding the small amount of pre-petition debt. We have never had a hearing regarding the amount of money owed on the post-petition debt as to whether or not there was a contract post-petition.

The Bankruptcy Act specifically forbids the type of contract which was found by Bankruptcy Judge Babitt to be in existence, in his amended gratuitous finding of fact --

THE COURT: That is a law question when you get to the Court of Appeals.

MR. SHUFFMAN: that is a law question. However, there was a -- the compromise agreement which was submitted to Bankruptcy Judge Babitt four months after the petitions were signed, that stated that Hartford and that Rudd were parties to two agreements, also stated that no one else would be paid under that agreement or pursuant to that agreement, except Rudd for the cost of materials, yet one day before that agreement had been signed and submitted to Bankruptcy Judge Babitt, a check had been given to Oscar Shuffman marked "prepayment."

THE COURT: That is already in the record, isn't it?

MR. SHUFFMAN: Yes, sir, it is.

THE COURT: So the Court of Appeals knows that, don't they?

MR. SHUFFMAN: However, this court has stated in its original order, after approximately one hour of argument, that the agreements which were stipulated and agreed to be in effect four months after the petitions were filed, fell pre-filing of the petitions.

Now, my adversaries have deliberately misrepresented facts to this court. They have deliberately falsified their argument. They have falsified affidavits in this court and in the Court of Appeals.

THE COURT: All of those arguments can be made to the Court of Appeals.

MR. SHUFFMAN: In 20 minutes in the Court of Appeals. It has taken us three hours in this court for this court to determine that the debtors had in fact acted improperly.

THE COURT: Insofar as the time limits of the Court of Appeals are concerned, may I suggest to you that the Second Circuit is one of the few Courts of Appeals in the country which assures every litigant an opportunity for oral argument.

In many circuits that is simply not permitted in the interests of time-saving, which is wrong.

Furthermore, you have a right to put in a brief, and those judges, when they sit there

and hear your oral argument, will have read your brief, and they will have read your adversary's brief, so it seems to me that if there are any questions left in this case, they are pending in the Court of Appeals now, and that court has not only the power but also I assure you it has the ability.

If there has been any error committed by Bankruptcy Judge Babitt they can rectify it very promptly and readily.

Now you have three appeals pending up there and it seems to me that you ought to consolidate your appeals, have them heard and decided promptly, and get it over with.

And it seems to me further that there is simply no subject matter jurisdiction for what you are seeking presently in the district court.

MR. SHUFFMAN: That's right, sir. However, the court --

THE COURT: If that's right, that really ends this motion, doesn't it?

MR. SHUFFMAN: No, sir, it does not. Under the cases cited and under orderly procedure as determined by this Circuit, and in existence up until May 9th, the fact that this court had determined to grant reargument before, it should now reach the merits of that original rehearing and reargument motion --

THE COURT: You filed the notice of appeal, didn't you?

MR. SHUFFMAN: Your Honor, I filed that on the next to the last date because oral argument on the motion to hear and reargue

was scheduled four or five days after the last date to file the appeal.

THE COURT: Who scheduled that?

MR. SHUFFMAN: I did.

THE COURT: Well, that's your own choice then, isn't it? You can't blame the court for that.

MR. SHUFFMAN: Yes, sir, that is true.

THE COURT: I ordinarily hear motions at 9:30 on any business day, if I'm available in the district. If I'm not myself available in the district, the clerk calls up the moving party and tells him, "Please come in earlier, if you can, or otherwise come in at a future date." So you made your procedural choice here.

MR. SHUFFMAN: However, your Honor, I was not informed by the clerk of the district court that an order had in fact been entered. Approximately 10 days had elapsed or 9 days had elapsed --

THE COURT: Don't you read the Law Journal?

MR. SHUFFMAN: Yes, sir, I do. Apparently I missed that.

THE COURT: I think your case is presently pending in the Court of Appeals, and I think you have nothing pending here with me.

MR. SHUFFMAN: Your Honor, we have this motion pending. The Court of Appeals was aware that an appeal was pending when it entered the order allowing us to apply to you for whatever relief was appropriate.

THE COURT: That doesn't mean that you can apply to me to reargue that motion from which you are taking the appeal. They are talking about whatever relief is appropriate. They didn't change the case law by that order.

MR. SHUFFMAN: Yes, sir, they did. In essence they --

THE COURT: I don't think so.

MR. SHUFFMAN: They recognized your April 17, 1978 order vacating the original determination to grant reargument as entered, based upon the merits.

Now the case law states that your Honor was without jurisdiction to vacate that determination. I doubt that this court had jurisdiction to grant reargument in the first place. However, this court did signal and signify its intention to grant, and that is what I attempted to point out to the Court of Appeals.

THE COURT: It wouldn't make any difference, would it? You filed a notice of appeal, so anything I said or did would make no difference. If I incorrectly perceived the situation or if in fact I indicated a willingness to hear reargument, that has no significance at all. You were in the Court of Appeals then. You are in the Court of Appeals now. They have full and complete jurisdiction, and the Court of Appeals can deal with this matter just as well as I can, perhaps better, and with greater finality.

MR. SHUFFMAN: No, sir, I don't believe they can, because the Court of Appeals suffers from the same infirmity that this court does. Based upon the new Bankruptcy Act elevating

the status of Bankruptcy Referees to Bankruptcy Judges, the district court and the Court of Appeals cannot make findings of fact.

What the Court of Appeals can do if they find there was error in a judge making findings of fact and amended findings of fact without a hearing is that once again send us back to Bankruptcy Judge Babitt to make new findings of fact.

THE COURT: That they can do.

MR. SHUFFMAN: That they can do. However, part of the motion before your Honor is to vacate the orders of Bankruptcy Judge Babitt and disqualify Bankruptcy Judge Babitt for what he did in finding facts without a hearing, for entering an opinion and an order, an order supporting that opinion, containing findings of fact made without a hearing as Bankruptcy Judge Babitt did in the Overmyer bankruptcy case, and for which he was removed and the case sent to another judge.

This is not a single isolated incident with Bankruptcy Judge Babitt. Apparently he has engaged in this type of conduct on at least one other occasion and there are a number of attorneys who I have heard have taken complaints based upon the same type of conduct by Bankruptcy Judge Babitt.

District Court Judge MacMahon was very quick to point out that --

THE COURT: One case, In re Overmyer, and one case where a relative of his was a partner in an accounting firm which was involved in the Overmyer proceedings and therefore the appearance of impropriety was created and therefore Judge MacMahon required that it be reassigned.

This has all been gone into by Judge Motley's committee. All you are working on is hearsay.

MR. SHUFFMAN: No, sir, I believe that District Judge MacMahon's order in the Overmyer case was different than the opinion of the Bankruptcy Committee. District Court Judge MacMahon stated that an order declaring the company bankrupt should be entered on an evidentiary hearing supported by a full record. Bankruptcy Judge Babitt failed to hold a hearing as to the company's insolvency but instead, in a pique of anger, declared the company bankrupt and it was based upon that reason that District Judge MacMahon stated that the case should go to a different Bankruptcy Judge, remove Bankruptcy Judge Babitt.

Your Honor has already stated during one of the other hearings; based upon argument, that the debtor has maintained at least two sets of books, that either they had their payables recorded improperly or else they had two sets of books.

We wish to point out to this court that on the day the petition is filed those books are frozen.

Now, if in fact there was a notation that money was owed to Oscar Shuffman an application and order was signed post-filing of the petition, showing Oscar Shuffman being owed monies by Oxford Chemical Corp. after the petition was filed, why did not the court-appointed accountants find an entry in the books of Oxford Chemical when they went in to determine the condition of the companies on the date the petitions were filed? It wasn't there.

This court has said either there were two sets of books or their payables were recorded improperly. If their payables were recorded improperly they have since eliminated that improper notation in the books. They have fiddled with the books, they have changed entries after a time when they were not supposed to, which would constitute another crime.

We have already stated, and this court has already acknowledged, that the payment made to Oscar Shuffman on November 1st and the application that was submitted to Bankruptcy Judge Babitt on November 2nd, didn't coincide, that obviously someone acted improperly.

Now we believe that that constituted filing of a false document in bankruptcy. The attorneys for the debtors told the court that that payment was made against their instructions and without their knowledge. Yet they told Bankruptcy Judge Babitt on September 28th that they were well aware that those payments were being made. Bankruptcy Judge Babitt on September 28th said obviously there was a mistake in his decision, that we were in fact entitled to the full amount of the money owed. But because you cannot amend a claim after confirmation, he would not order full payment made. However--

THE COURT: He is either right or wrong on that.

MR. SHUFFMAN: He was wrong because we were talking about administration expenses which are solely within the province of the Bankruptcy Judge and they are not determined by Section 57 of the Bankruptcy Act.

We also asked Bankruptcy Judge Babitt to amend his order approving the compromise between Hartford and Rudd for which Oscar Shuffman was not given notice, for which he should have been given notice.

Under the doctrine of Pepper vs. Litton, as was pointed out to this court on several occasions, a Supreme Court case, this court does have the power post-confirmation to amend orders in order to prevent injustice.

THE COURT You want to talk about the merits of the orders appealed from?

MR. SHUFFMAN: Yes, sir, I do.

THE COURT: And I say to you again that issue is in the Court of Appeals for the Second Circuit. That issue is not here.

MR. SHUFFMAN: However, the Court of Appeals would mandate and send this case back to this court if this court believes that it committed an error in its affirmance of the Bankruptcy Judge's orders. They are waiting for a signal from the district court judge. We have had a motion to rehear and reargue the May 9th corrected order pending for approximately two months. That is the reason why --

THE COURT: My function here is to deal with cases or controversies which I have subject matter jurisdiction. If a case is pending in this court, it is proper for me to deal with it. If a case is not pending in this court it is not proper for me to deal with it and I am not here to send quote signals unquote to any other court of a higher level. That is not my function to send any signals to the Court of Appeals.

I don't have this case on the merits. I might have ancillary matters that might arise, and we do have one or two of those you have mentioned in your motion papers, but I do not have subject matter jurisdiction at this point in time of the merits of the orders appealed from, the underlying orders of Judge Babitt.

MR. SHUFFMAN: However, your Honor, in a situation like this, under one of the cases cited as Exhibit B, First National Bank of Salem, Ohio versus Hirsch --

THE COURT: Sixth Circuit case.

MR. SHUFFMAN: Yes, sir, it is. Although that totally had been followed by this Circuit District Judge, I believe, Mansfield, who was one of the three judges on the panel who entered the May 9th order, wrote a decision while he was a district court judge, Rolle versus the City of New York, that said he did not have jurisdiction because an appeal was pending.

He went on to explain what he would do if he had jurisdiction.

Basically, the orderly procedure had been, and the Administrative Director of the United States Courts sent a memorandum to district court clerks outling proper procedure once a notice of appeal has been filed, basically for a motion to be made in the district court, the district court does not have the power to grant relief, however. The district court, if it has determined to grant reargument, which this court in fact did, must enter an order saying that it intends to grant reargument.

This was the reason why I sent the letters to the court when I did in April, because I intended --

THE COURT: This is not as if I had tried a case and observed witnesses, and made findings and conclusions and entered a final judgment as a court of first instance, as a nisi prius court does, and then, lo and behold, after the judgment is entered and an appeal is filed, it comes out that there's been an obvious mistake.

We do have those. We have computation errors or we have some minor inconsistency which turns out to be of major significance in the findings of fact, and there I assume that will be a proper situation where all the parties could say to the Court of Appeals, "We want to reopen the trial record in the court below."

But what you are asking me to do is to give an advisory, what you call a signal to the Court of Appeals that I would like them to send back subject matter jurisdiction of a matter over which I clearly don't have subject matter jurisdiction at the present time, and I am not inclined to do that, and I will not indicate and I state to you emphatically on the record, and I am not indicating or suggesting any willingness to do anything should that court remand the matter, which it has not done -- it has clearly not remanded the matter, and this corrected order that you talk about does nothing except affirm existing case law, and make the point that the court has jurisdiction over ancillary items --

MR. SHUFFMAN: No, sir.

THE COURT: -- of which I don't perceive any related to the merits of the order.

MR. SHUFFMAN: Your Honor, the Court of Appeals order allowing us to apply down here was much broader than the relief that I had requested. They said for whatever relief was appropriate.

THE COURT: Yes.

MR. SHUFFMAN: Your Honor disputed the fact that they did not tell you what was appropriate. Now we believe the appropriate relief would be, and we have moved today, that the law firm of Weil, Gotshal & Manges be disqualified from representing the debtors.

THE COURT: The bankruptcy is over, isn't it?

MR. SHUFFMAN: No, sir, it is not.

THE COURT: What are they doing?

MR. SHUFFMAN: Bankruptcy is not over until the final claim is adjudicated. This claim is still pending.

THE COURT: Didn't they confirm the plan?

MR. SHUFFMAN: The plan has been confirmed.

THE COURT: And haven't all claims been adjudicated in the Bankruptcy Court?

MR. SHUFFMAN: In the Bankruptcy Court, but they have not been finally adjudicated.

THE COURT: They are finally adjudicated unless the Court of Appeals reverses and remands it to the Bankruptcy Judge for further proceedings.

MR. SHUFFMAN: We are asking this court to remove Bankruptcy Judge Babitt from sitting and holding any further proceedings on this cause.

THE COURT: When your claim is remanded to the Bankruptcy Court for hearing, if it is, then and only then will that be an actual controversy, because there is no indication at this time that Bankruptcy Judge Babitt has anything more left to do with these cases.

MR. SHUFFMAN: However, this court specifically recognized, I believe it recognized that it had made some errors in its orders, in its original affirmance and in its statements on the record. We have asked this court to correct those errors before we have to go up to the Court of Appeals and let them sit in judgment upon an order which this court has recognized to be an error.

THE COURT: Well, I don't know that I recognized that I was in error on the bottom line conclusion. It would not be unheard of for the Court of Appeals to affirm an order of a district court on a theory or on a perception of the matter slightly different. Sometimes we are right for the wrong reason in this court.

MR. SHUFFMAN: However, your Honor, again I repeat that it is virtually impossible for a judge to make findings of fact without holding a hearing.

This court has affirmed the ability of Bankruptcy Judge Babitt to find facts without a hearing.

THE COURT: Let me say that I have no subject matter jurisdiction of the underlying

order. I have no basis and I believe it would be improper for me to accede to any request that I give any signal to any appellate court as to what I might do on an academic question, that is to say what I might do if I had subject matter jurisdiction.

I sit here to adjudicate cases in controversy, of which I have subject matter jurisdiction, and nothing more than that.

The court does have the jurisdiction and power to remove and disqualify Bankruptcy Judge Babitt from conducting any further proceedings. However, that request is not timely at this time since there is no suggestion at this time that he has any further proceedings to conduct in the consolidated bankruptcy proceedings. He will only have anything further to do when and if you are successful on your appeal, and when and if that event occurs, you can renew your request that it be reassigned to a different Bankruptcy Judge, and that portion of your motion ought therefore to be denied without prejudice.

As far as removing and disqualifying the law firm, nothing has been shown to me that there is any conflict of interest. They represent a party adverse to you and I don't see anything more than that.

MR. SHUFFMAN: They have taken a position adverse to that of their client, your Honor. They have stated to this court that payments were made by their client against their instructions and without their knowledge.

THE COURT: Would it matter?

MR. SHUFFMAN: Yes, sir, it would.

THE COURT: How would it matter? The payments were made. It doesn't matter whether they knew about it or not.

MR. SHUFFMAN: It certainly does because they drafted the compromise agreement and order that was submitted to Bankruptcy Judge Babitt stating that no payments would be made. Here they are telling their client to go out and violate Section 152 of Title 18. However, then they represent them in this court. Now I think their client, who again we are suing, is entitled to representation by an attorney who is looking out for their best interests, not saying, "Yes, my client broke the law. We didn't." And be allowed to continue to represent them in this court on a civil appeal.

THE COURT: Well, you have no standing to complain about that, Mr. Shuffman.

MR. SHUFFMAN: Your Honor, as a creditor of the debtors, we do have a right to complain about the actions of the attorneys for the debtor. We do have standing to complain.

THE COURT: And there is no basis for me to make a finding that the law firm or any member thereof made any false statement. The statement could be true.

MR. SHUFFMAN: Your Honor did have the entire record before him when he entered or before he entered his February 22nd order. The fact that the statement was made on February 7th to you, that they did not know that payments were being made, they were being made against their instructions, you had the copy of the September 28th hearing transcript in front of Bankruptcy Judge Babitt at that time, wherein they specifically stated that they

were aware that payments were being made. They knew exactly what was going on. They needed Oscar Shuffman in a case involving another third party, W. R. Grace & Co., where they were attempting to do the exact same thing they did with Rudd Plastics. When they got enough acceptances of the potential plan from creditors, they decided not to sue W. R. Grace --

THE COURT: All right, I've heard enough about W. R. Grace. So far as concerns your last item or relief requested here, I decline to direct the Attorney General to do anything at all. There is no factual or legal basis for me to make any such direction to the Attorney General, and he has enough on his hands.

As far as I can see, you already have had an opportunity to speak or write to the United States Attorney in this district. You have sent to the court copies of several letters to the United States Attorney in this district. The United States Attorney in this district has prosecutorial discretion on matters and if he does not elect to sign an indictment in a case, even if the grand jury thought that a crime had been committed, that person cannot be prosecuted. That is the case of Cox against the United States.

So that is a frivolous request, that last item, and that is denied on the merits.

MR. SHUFFMAN: However, your Honor, if I may point out to the Court that the United States Attorney for the Southern District of New York was a senior partner in a law firm here in Manhattan before he was appointed United States Attorney.

THE COURT: Most of them are.

MR. SHUFFMAN: That particular law firm represented the late Oscar Shuffman at the time that he was talking to them about taking this particular case. I do not believe that the United States Attorney should therefore be the one to determine just what they are going to do, whether or not they are going to investigate, whether or not they are going to prosecute.

There is an appearance of impropriety created by the United States Attorney for the Southern District of New York, who was personally investigating and reviewing this case, based upon the fact that I had indicated that it appeared that the investigation was being whitewashed, it was not being conducted properly; at the same time he was personally reviewing and investigating. Based upon the accusation that the investigation was not being conducted properly, he allowed his assistant in charge of white collar crime and business fraud to become a partner at Weil, Gotshal & Manges.

Now, one would think if that man was to be a prosecutor of white collar crime, the United States Attorney for the Southern District would tell him, "I have an investigation pending which I'm personally reviewing, it would appear improper and please do not go"; who voted, while at Weil, Gotshal & Manges, to hire the Assistant United States Attorney in charge of white collar crime and business fraud, if not the senior partners in Weil, Gotshal & Manges, who knew they were under investigation by that very office.

THE COURT: Well, the fellow resigned, didn't he, to go practice law?

MR. SHUFFMAN: Yes, sir, he did.

THE COURT: After he is hired and after he has resigned, he has no power.

MR. SHUFFMAN: After he is hired and after he has resigned; however, he should not have been applying, while an investigation was under way into the conduct of that law firm. It creates an appearance of impropriety, and a clearcut conflict.

THE COURT: I'm not going to grant that relief requested. I don't think you show sufficient facts to justify such a granting, if the court had power to do it, which is a matter about which I have considerable doubt.

There is a separation of powers in this country, you know, and the courts don't want everything. If you don't like the way the Attorney General performs or if you don't like the way the United States Attorney in this district performs, write your congressman. I believe you have already done that, haven't you?

MR. SHUFFMAN: No, sir, I have not.

THE COURT: Didn't you write to a senator?

MR. SHUFFMAN: No, sir, I have not.

THE COURT: I thought you did. Be that as it may, the court believes in the separation of powers and I'm not going to tell the United States Attorney what to do.

MR. SHUFFMAN: However, your Honor, there is a provision in the Bankruptcy Act, if the court believes there has been improper conduct, that the court itself instructs the United States Attorney to conduct an investigation.

THE COURT: That he already did.

MR. SHUFFMAN: Your Honor, I wonder about that. He claims to have conducted an investigation. He claims that the results of that investigation show no need to further pursue this matter. Yet after he sent two letters to that effect, he sent members of his staff regularly to the Bankruptcy Clerk's office to requisition and review the files.

Now when did he conduct his investigation? Before or after he determined that no investigation was necessary?

THE COURT: I think they were investigating Overmyer's files.

MR. SHUFFMAN: No, sir, they were not. The docket sheet of the Bankruptcy --

THE COURT: No yelling, Mr. Shuffman. I've heard enough from you. You sit down.

MR. SHUFFMAN: I'm sorry.

THE COURT: You sit down.

All right, do you have anything to say?

MR. MITTMAN: Your Honor has said everything. Just one point, your Honor. This matter has been around for three years. The Court of Appeals can handle any charges or any issues of law or fact which may be arising. There are three appeals before that court. If Mr. Shuffman doesn't so move, we will move to consolidate the three appeals to have the matters heard as expeditiously as possible.

THE COURT: Why haven't you done that already? Don't you want to get rid of that matter somehow, win, lose or draw?

MR. MITTMAN: Your Honor, we would love to get rid of this. I assume --

THE COURT: These are 1973 filings. What are you assuming?

MR. MITTMAN: Your Honor, we did not file the notice of appeal in this case. Mr. Shuffman did. He is the appellant.

THE COURT: That is clear, yes.

MR. MITTMAN: He is the appellant. I assume a notice of appeal will be filed from whatever your Honor does today. We will move to consolidate the appeals, to have the matter heard as expeditiously as possible.

THE COURT: That is what your duty is. It also is Mr. Shuffman's duty.

All right, I will summarize my findings and conclusions on this motion very quickly.

This court lacks subject matter jurisdiction of the initial request and declines to grant it and declines to make any statement which might be construed as any signal to any higher or appellate court.

The court believes that the interests of justice in this case would be served best if the appellant would take his three appeals and perfect them and have them argued and decided by the Court of Appeals.

The court points out again that the district court held no hearings of an evidentiary nature, took no proof, made no conclusions about credibility, and found no facts, merely acted in accordance with the rules as an intervening court of review.

As far as removing and disqualifying the Bankruptcy Judge, as I said earlier, there is no need to do that at this time, and that is denied without prejudice to reassert that branch of the motion if there is a remand to the Bankruptcy Court, and if the decision of the Court of Appeals, making any such remand, fails to speak to the issue.

I see no basis to remove or disqualify the law firm, and that branch of the motion is denied.

I said earlier that I see no basis to make any direction to the Attorney General of the United States on what is before me here and I decline to do that, so this motion will be endorsed as denied, with a reference to the transcript of the proceedings before me this day. And it is so ordered on this transcript.

All right, that is all.

MR. MITTMAN: Thank you, your Honor.

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APPENDIX J

FOURTH ORDER OF THE DISTRICT COURT

Index No. 73B 674-676

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In the Matter of :

HARTFORD TEXTILE CORPORATION, :
OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC., :

Debtors. :

----------x

JULY 13, 1978

Motion denied. See Transcript of hearing this date.

SO ORDERED.

/s/ Charles L. Brieant
U.S.D.J.

APPENDIX K

FIRST OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. Nos. 36, 92, 114, 294 August Term, 1978

Argued: October 19, 1978 Decided: December 6, 1978

Docket Nos. 78-5024, 5032, 5036, 5045

In re

Hartford Textile Corporation,
Oxford Chemicals, Inc.,
Wellington Print Works, Inc.,

Debtors.

Rose Shuffman, As Executrix of the Estate of Oscar Shuffman,

Appellant,

-against-

Hartford Textile Corporation,
Oxford Chemicals, Inc.,
Wellington Print Works, Inc.,

Appellees.

Before:

SMITH, TIMBERS, and VAN GRAAFEILAND,
Circuit Judges

Appeal from four orders of the United States District Court for the Southern District Court for the Southern District of New York, Brieant, Judge, one affirming the orders of the Bankruptcy Court reducing the creditor's claim and three denying the creditor's motions for rehearing and other relief.

Affirmed.

DAVID K. SHUFFMAN
New York, N.Y.,
For Appellant

BRUCE R. ZIRINSKY
New York, N.Y.
(Brad Eric Scheler,
Weil, Gotshal & Manges,
New York, N.Y., of
counsel)
For Debtors-Appellees.

PER CURIAM:

These consolidated appeals arise from a Chapter XI bankruptcy proceeding in which appellant's claim for $80,000 in unpaid commissions was denied. Appellant is the executrix of the estate of Oscar Shuffman who, prior to the filing of the Chapter XI petition, had entered into a commission contract with Hartford Textile Corporation, the debtor-in-possession. The contract provided that Shuffman was to receive a finder's fee of one cent per pound on all vinyl delivered to Hartford under a separate contract between Hartford and Rudd Plastic Fabrics Corporation. The contract between Hartford and Rudd called for periodic shipments of an eventual total of ten million pounds of vinyl. Before Hartford encountered the financial difficulties that forced it into Chapter XI, Rudd made deliveries under the contract, and Hartford paid commissions to Shuffman based on the amounts delivered.

As financial problems beset Hartford, it fell behind in its payments to Rudd for goods received. Approximately two weeks before Hartford filed its Chapter XI petition, Rudd notified Hartford that, because of Hartford's delinquencies, it was cancelling the supply contract. Shortly after Hartford filed its petition, Hartford and Rudd entered into compromise negotiations to which Shuffman was not made a party. The compromise agreement, which was submitted to the bankruptcy court for approval, called for delivery of approximately 1.2 million pounds of vinyl at an increase in price. It was approved by the court without prior notice to Shuffman, who had not yet filed a claim against the debtor.

Shuffman's claim, when filed, was for approximately $80,000, based on services rendered prior to the filing of the petition. However, Shuffman conceded during the bankruptcy hearing that he had been paid commissions on all deliveries made to Hartford before the filing.[1] Accordingly, his claim for $80,000 could be justified only if commissions were payable on the full ten million pounds of vinyl regardless of whether all of it was delivered. The bankruptcy court interpreted Shuffman's agreement with Hartford to entitle Shuffman to commissions only on goods actually received and accepted by Hartford. We agree. The agreement is unambiguous and permits no other interpretation. See Glen Manufacturing, Inc. v. Perfect Fit Industries, Inc., 299 F. Supp. 278, 281 (S.D.N.Y. 1969), remanded on other grounds, 420 F.2d 319 (2d Cir.), cert. denied, 397 U.S. 1042 (1970). To the extent that Shuffman's claim sought commissions on the entire ten million pounds of vinyl, whether delivered or not, it was without merit.

Appellant contends that the compromise agreement was not a new agreement but was merely a modification of the old one. From this she argues that she is entitled to commissions on all deliveries, up to ten million pounds, made by Rudd to Hartford since the original contract was executed, including deliveries made after the petition was filed. This argument also is without merit. The bankruptcy court found that the original contract between Hartford and Rudd had been cancelled, and this finding has support in the record.[2] Appellant asserts that the bankruptcy court's finding of cancellation contradicted certain "stipulated and agreed facts." The "stipulation" to which appellant refers is the preliminary language in the Hartford-

Rudd settlement agreement which reads "Whereas Hartford and Rudd are parties to [the prior agreement]" and which thenpreserves, in the event of a breach of the settlement agreement, the rights and duties of Hartford and Rudd under the prior agreement. The settlement agreement also provides that "either party shall be free to pursue any remedy at law or in equity on account of any liability or breach of duty arising prior to the effective date of this agreement."

Appellant misunderstands the purpose and legal effect of this language. It was not designed to, and did not, serve as an acknowledgement of the continued existence of the original contract, binding the bankruptcy court to find the original contract still in force. Language such as this is common to settlement agreements; it served merely to preserve for possible future lawsuits the right of Hartford and Rudd to claim a breach by the other of the admittedly terminated contract. The bankruptcy court did not, therefore, contradict any stipulated facts when it found that the original Hartford-Rudd agreement had been cancelled.

Appellant's contention that certain payments made to Shuffman by Hartford during the period of arrangement constituted an "affirmance" of his original commission contract also is unfounded. Shuffman's agreement with Hartford was tied to the original contract between Hartford and Rudd, and his right to commissions was contingent upon deliveries to Hartford under the terms of that contract. After the basic sales contract was terminated, "affirmance" of Shuffman's right to receive commissions thereunder would have been meaningless. Although the bankruptcy court found initially that there was no post-petition

commission agreement between Hartford and Shuffman, it later made an amended finding that there was such an agreement. It based this finding on post-petition checks Hartford made out to Shuffman marked "prepayment against new Rudd contract" and on Hartford's acquiescence in the court's proposed decision to hold it liable for commissions for deliveries under the new Rudd contract. In view of the fact that the original Hartford-Rudd contract had been cancelled, the bankruptcy court's finding that an agreement had been reached to pay commissions for deliveries made under the settlement agreement did not prejudice appellant. It entitled her instead to an additional $3,346.71 in commissions.

Equally unfounded is appellan 's contention that the bankruptcy judge erred in denying priority status to her claim for commissions as an administration expense. The record established that appellant has received payment in full on all deliveries made by Rudd to Hartford during the period of arrangement. If appellant believes that she has not received commissions due her on deliveries made thereafter, her remedy lies not in the bankruptcy court nor on this appeal, but in a plenary action at law. See In re Gordon, 44 F.Supp. 581 (S.D.N.Y. 1942); 9 Collier on Bankruptcy ¶¶8.11, 8.12 (14th ed. 1975).

When Shuffman filed his claim, Hartford filed an objection to it. The objection was withdrawn during settlement negotiations that followed. When these fell through and Shuffman died, Hartford applied to the court for restoration of its objection. Appellant asserts that the bankruptcy court erred in conducting a hearing on the objection promptly after it was restored. Appellant was not prejudiced by this exercise of the court's discretion. Shuffman had been on notice of

the grounds for the objection from the time it was filed, more than two years before. Moreover, the claim objected to was based on the original commission contract between Hartford and Shuffman, and the interpretation of that unambiguous agreement was essentially a matter of law. See National Utility Service, Inc. v. Whirlpool Corp., 325 F.2d 779, 781 (2d Cir. 1963). Hartford's comptroller testified at the hearing as to the quantity of pre-petition deliveries reflected in Hartford's books and records, and appellant's counsel subjected him to a thorough cross-examination. Appellant had ample opportunity at the hearing and in her memoranda to present her case to the court, both as to the meaning of the contract and as to the amount of vinyl actually delivered. Again we note appellant's concession that commissions have been paid on all pre-petition deliveries. We do not believe that the court abused its discretion by refusing to adjourn still another time a case that had been on its docket for more than three years.

On February 22, 1978, the orders of the bankruptcy judge relating to appellant's claim were affirmed by Judge Brieant of the United States District Court for the Southern District of New York. On March 6, 1978, appellant moved for reargument, the motion being returnable before Judge Brieant on March 28, 1978. On March 23, 1978, appellant filed a notice of appeal to this Court from the order on which she was seeking reargument. Judge Brieant, who was unaware of the appeal, heard oral argument and reserved decision on the reargument motion. On learning of the appeal, Judge Brieant on April 17, 1978, vacated his determination to hear reargument and denied the motion without prejudice to such proceedings on

appeal as the parties might deem appropriate. Appellant has appealed from that order.

While the two appeals were pending, appellant moved in this Court for an order remanding the matter to the district court. This application was denied "without prejudice to apply to Judge Brieant for whatever relief is appropriate." Appellant then moved again in the district court for rehearing and reargument, and this motion was denied on June 9, 1978. A third motion for rehearing and reargument was denied on July 13, 1978. At the same time, the district judge denied appellant's application for an order disqualifying the bankruptcy judge and the debtor's attorneys and directing the appointment of a special prosecutor. Appellant has appealed from these orders. All four of appellant's appeals are before us now.

With respect to the appeal on the merits from Judge Brieant's order of February 22, 1978, we conclude, despite the voluminous and vitriolic protestations of appellant's counsel,[3] that appellant's rights in the Chapter XI proceeding were recognized and protected; and the order appealed from is affirmed. Because an order denying reargument is generally not appealable, see In re Brendan Reilly Associates, Inc., 372 F.2d 235, 238 (2d Cir. 1967), and the issues herein are being disposed of on the merits, the appeals from Judge Brieant's orders denying reargument are dismissed. The remainder of Judge Brieant's order of July 13, 1978, is affirmed.

FOOTNOTES

1. At the time the petition was filed, Hartford owed commissions to Shuffman in the amount of $1,032.69. Six hundred dollars of that amount was paid to Shuffman pursuant to §64a(2) of the Bankruptcy Act, 11 U.S.C. §104(a)(2). The remaining $432.69 became a general unsecured debt.

2. The bankruptcy judge found erroneously that the agreement between Hartford and Rudd was cancelled after the filing of the Chapter XI petition. However, the parties agree that notice of cancellation was given prior to the filing. When this fact was called to the attention of the bankruptcy judge, he held that it did not change the result he had reached.

3. Appellant's counsel has filed at least twenty-five motions in the course of these proceedings. Many were meritless and many repetitive. As a result, the costs of the proceedings have been increased so unreasonably and vexatiously as to warrant consideration by this Court of an order requiring the attorney to satisfy personally the excess costs. See 28 U.S.C. §1927. We refrain from issuing such an order at this time only because counsel is a young man representing his widowed mother. In so doing, we in no way condone the course of conduct that counsel has pursued in this matter.

APPENDIX L

FIRST ORDER OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of December one thousand nine hundred and seventy-eight

Present:

HON. J. JOSEPH SMITH

HON. WILLIAM H. TIMBERS

HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges,

In the Matter of	:	
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC.,	:	
Debtors.	:	78-5024 78-5032 78-5036
ROSE SHUFFMAN, As Executrix of the Estate of OSCAR SHUFFMAN,	:	78-5045
Appellant,	:	
-against-	:	
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC.,	:	
Appellees.	:	

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of February 22, 1978 of said District Court be and it hereby is affirmed, that the appeals from the orders dismissed and the remainder of order of July 13, 1978 of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By: /s/ ARTHUR HELLER
ARTHUR HELLER,
Deputy Clerk

APPENDIX M

SECOND ORDER OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 5th day of March, one thousand nine hundred and seventy-nine.

Present:

HON. J. JOSEPH SMITH

HON. WILLIAM H. TIMBERS

HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges

In The Matter of	
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC., Debtors.	78-5024
ROSE SHUFFMAN, As Executrix of the Estate of OSCAR SHUFFMAN, Appellant,	78-5032 78-5036 78-5045
-against-	
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC., Appellees.	

A petition for a rehearing have been filed herein by the counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and herby is DENIED.

/s/ A.DANIEL FUSARO,
A.DANIEL FUSARO, Clerk

APPENDIX N

THIRD ORDER OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of March, one thousand nine hundred and seventy-nine.

In the Matter of	
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC. WELLINGTON PRINT WORKS, INC. Debtors.	78-5024
ROSE SHUFFMAN, as Executrix of the Estate of OSCAR SHUFFMAN, Appellant	78-5032 78-5036 78-5045
-against-	
HARTFORD TEXTILE CORPORATION, OXFORD CHEMICALS, INC., WELLINGTON PRINT WORKS, INC. Appellees.	

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN

IRVING R. KAUFMAN, Chief Judge